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# INTRODUCTION

The Commission on Election Contributions and Expenses has unique responsibilities in the supervision of election finance laws of Ontario. Not only is it charged with supervision of the political finances of parties, associations and candidates, but also with recommending amendments to the Act under which it operates.

While the Commission has regularly recommended amendments to the Election Finances Reform Act which will make for better administration, it has not dealt with political policy, which is a matter for the government of the day and the Legislature. Nevertheless, the Commission has taken the responsibility over the years of maintaining an active research department and publishing its work. Members of the Commission and staff regularly attend Canadian and international conferences where different systems of financial control are discussed. We feel the responsibility of providing Members of the Legislature and the public with background material for any policy decision which may be put forward.

In 1985, two such matters became current, namely proposed over-all limits on election spending, and limits on party leadership campaigns. These are both political policy concerns. The Commission has produced the discussion paper which follows. While it is principally the work of one researcher, the text has been reviewed to comply as far as reasonable with the Commission's policy of presenting factual background material as a basis for debate.

January 1986

Gordon H. Aiken,
Chairman.

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# PART I

## REGULATION OF CAMPAIGN SPENDING

On 2 May 1985, the voters of Ontario returned a minority legislature composed of 52 members of the Progressive Conservative Party, 48 members of the Liberal Party and 25 members of the New Democratic Party. In popular vote, the Liberals edged out the Conservatives to take the lead at 38%, with the P.C.'s at 37% and the New Democrats at 24%. The Progressive Conservatives have formed the Government in all 12 elections since 1943, even though on three occasions, they did not hold a majority of seats in the Legislature.[1] The Progressive Conservative Party was able to stay in Government following the May election, however, after a round of negotiations with both the Liberals and the Conservatives, the New Democratic Party decided to support the Liberals. An agreement was signed on 28 May 1985, between David Peterson, Leader, Ontario Liberal Party and Bob Rae, Leader, Ontario New Democratic Party, in which the Liberals agreed that they would not call an election for two years and the New Democrats agreed not to defeat the government for two years. Attached to the agreement were documents setting out proposals for action in three areas: Legislative reform, economic issues and social policies. Included in the Legislative reform package was a sentence aimed directly at the Ontario Election Finances Reform Act:[2]

> Election financing reform to cover spending limits and rebates, at both the central and local campaign level.

The Liberal - N.D.P. group within the Ontario Legislature combined to defeat the P.C. Government and the Liberals formed a Government with the support of the New Democrats. It can be safely presumed that the legislative agenda of the new Government will follow closely the proposals set out in the Liberal - N.D.P. pact of May 1985.

This report will consider the reform of Ontario election finance laws regarding spending limits and rebates, as set out in the Liberal - N.D.P. agreement, in four parts: (1) an overview of the existing Ontario legislation; (2) Canadian legislation at the federal level, which strictly regulates spending and provides a more generous subsidy to candidates and parties than the Ontario rules; (3) comparative studies between the Ontario rules and those in other Canadian provinces; (4) a discussion of problems flowing from the Canadian Charter of Rights and Freedoms. Since there has been considerable discussion on public regulation of party leadership campaigns, a section of research and comment on this subject concludes the report.

This study was compiled by John Terry, Research Assistant at the Ontario Commission on Election Contributions and Expenses during the latter half of 1985, under the direction of the Commission's Research Director, Anna Stevenson, Q.C.

## PART I - Regulation of Campaign Spending

### 1. Overview of Existing Ontario Legislation

#### Election Finances Reform Act

There are, according to one author, at least 27 statutes bearing on election law in Ontario.[3] For instance, the Public Service Act[4] restricts political activity by civil servants; the Landlord and Tenant Act[5] and the Condominium Act[6] require that candidates and their agents be given access to residential buildings for election canvassing; and the Legislative Assembly Act[7] contains some rules regarding qualification for membership in the provincial Legislature. However, the bulk of the law governing elections is found in two statutes: The Election Act[8], which sets out the structure and operation of the ballotting process; and the Election Finances Reform Act[9] (E.F.R.A), which governs the financing of election campaigns.

Before 1975, when the E.F.R.A. was enacted, there was no comprehensive scheme for regulating finances in election campaigns. The Act grew out of the third report of the Ontario Commission on the Legislature [10] (the Camp Commission), which was issued in September of 1975.

The Camp Commission was established by the Legislature on June 9, 1972 with a mandate to:

> study the function of the Legislative Assembly with a view to making such recommendations as it deems advisable with respect thereto, with particular reference to the role of the Private Members and how their participation in the process of government may be enlarged.... [11]

Subsequently, Premier William Davis, with the consent of the party leaders of the House, requested the Camp Commission to report specifically on party and election campaign financing.

The membership of the Camp Commission was tripartite. Dalton Camp was a prominent member of the Conservative party, Douglas Fisher was a former New Democratic Party member of Parliament, Farquhar Oliver was the former head of the Ontario Liberal Party and a longtime member of the provincial Legislature. In their Third Report, the members of the Camp Commission provided a draft for an Election Finances Reform Act which was consistent, clear and well reasoned. Their model Act was designed to achieve a wide-reaching set of goals, which are described at various points in the report:

1) to remove the presence of "big money" derived from large and powerful sources, from the political process [12]

2) to ensure that credible candidates would be able to mount credible campaigns, by relieving the pressing needs of parties and candidates for campaign funds while providing some deterrent to over-expenditure [13]

3) to increase public knowledge and participation in the political process [14]

4) to create an open system, governed by reasonable rules which are upheld both in the recognized self-interest of parties and in the interests of the general public [15]

5) to dispel the mystery and secrecy which surrounds traditional fund-raising tactics and gives rise to an atmosphere of public distrust and cynicism regarding political institutions and participants [16]

6) to create a system which is equitable, regularly monitored and vigorously enforced [17]

While some changes were made in the draft Act proposed by the Camp Commission before its passage by the House, (notably the deletion of a proposed income tax check-off process for political donations, and the addition of a ceiling on permitted advertising expenditures by parties, riding associations and candidates), the basic thrust of the E.F.R.A. remained true to the proposals and goals of the Camp Commission. Upon passage of the Act, the Commission on Election Contributions and Expenses was authorized, as suggested by the Camp Commission, to administer and enforce the Act.[18]

The E.F.R.A. received Royal Assent on 2 May 1975, and the effective date of the Act was 13 February 1975. Although it contains many provisions, the Act can be conveniently divided into four major divisions:

(1) The creation of the Ontario Commission on Election Contributions and Expenses (C.E.C.E.) to supervise the operation of the Act and, among other listed duties, to investigate the financial affairs and records of registered parties; to authorize any prosecutions under the Act; and to recommend any amendments to the Act. The Commission is composed of two representatives from each political party with four or more members in the Legislature (currently the Progressive Conservative, Liberal and New Democratic Parties), along with a bencher from the Law Society of Upper Canada and the Chief Election Officer. The Chairman is appointed by the provincial cabinet.

(2) The establishment of a system of registering political parties as a mechanism for ensuring compliance with the financial requirements in the Act.

(3) The creation of a financial regime covering all registered parties. The scheme controls contributions, requires an accounting of contributions and expenses, restricts the time and amount of advertising, provides for a minimal public subsidy to candidates and requires an approved audit of party, constituency and candidate financial records.

(4) The provision of enforcement of the Act, both through the work of the Commission and the creation of fines for contravention of the Act.

The full details of the Act are found in the legislation itself and in several commentaries.[19] For the purposes of this study, two sections are critical. Section 39 sets the only spending limit found in the Act, by restricting advertising expenses; while section 45 sets out a small public subsidy for candidates.

SPENDING LIMITS

Section 39 reads:

> The total expenses incurred for advertising by a political party, constituency association or candidate registered under this Act, including advertising done by any person, corporation or trade union with the knowledge and consent of the political party, constituency association or candidate, by the use of time on the facilities of any broadcasting undertaking or by publishing in any newspaper, magazine or other periodical publication or by display through the use of any outdoor advertising facility shall not, during the period referred to in subsection 38(1) exceed,

(a) in the case of a registered party in relation to a general election, the aggregate amount determined by multiplying 25 cents by the number of names appearing on all of the revised lists of voters at the election for the electoral districts in which there is an official candidate of the party;

(b) in the case of a registered party in relation to a by-election in an electoral district, the amount determined by multiplying 50 cents by the number of names appearing on the revised list of voters for the electoral district; and

(c) in the case of,

(i) a registered constituency association of a registered party and the official candidate of such party in an electoral district, or

(ii) an independent candidate in an electoral district,

the amount determined by multiplying 25 cents by the number of names appearing on the revised list of voters for the electoral district.

The Camp Commission resisted the notion of spending limits in election campaigns, with the Liberal appointee dissenting.[20] The Commission had both policy and practical reasons for opposing limits. It was concerned that restrictions on expenditures might force parties to become more dependent on the news media to carry their message to the voters:

> Yet, we are surely not to leave the parties without adequate funds, or with resources insufficient to promote their cause and their candidates. Should the parties be unable to wage an effective campaign, and to employ all available legitimate means in doing so, it would mean, to a considerable degree, an increased dependency upon the media to report and interpret their platforms and arguments and to adjudicate the quality of their leadership and candidates. In candor, no party is willing to submit itself to such a circumstance. Given a campaign in which the issues are controversial and where the voters are confronted with multiple options and choices which is the rule rather than the exception in election campaigns the political parties need to have the capacity to advocate their own cause and with as much freedom and flexibility as their resources will allow. [21]

The practical concern expressed by the Camp Commission regarding spending limits concerned enforcement. After studying the rules then in effect for federal elections, the Commission concluded that it was almost impossible to calculate the commercial value of services provided to the candidate:

> Another concern with the Federal Act relates to the spending ceilings imposed upon the parties in election campaigns. The ceilings are liberal allowing each party to spend a total approximating a maximum of more than $10 million, assuming a full slate of candidates. However, the difficulty with spending ceilings is that of enforcement. Apart from very practical and realistic considerations, all of which relate primarily to the uneven capability of constituency organizations to monitor precisely their expenditures during the heat of a campaign, it is our considered judgment that the parties will find it all but impossible to conform to that portion of the Act which requires that they declare 'the commercial value of ...services provided for the use of the candidate'... A more difficult task for the parties and their candidates is that of placing a "commercial value" on individuals who volunteer their services and, by so doing, contribute some form of special expertise to the campaign. [22]

The Camp Commission added other practical concerns:

> Under the Federal Act, attempting to place a commercial value on the contribution of personal services may be complicated, but there is yet another consideration which is the enormous advantage which governments in power have during election campaigns, in terms of being able to utilize the services of countless ministerial assistants, secretaries, researchers and other public employees, to say nothing of the transportation and communications systems at their disposal. Surely it would be virtually impossible to distinguish bona fide government activity from political activity in attempting to determine a realistic valuation. There must be room for common sense and the regulations governing our political procedures ought to be practical and sensible enough to encourage compliance and not to repel it. It seems to us that if a party employs anyone, for whatever purpose, the transaction is easily reported and must be. But any individual ought to be free to volunteer his or her services to a partisan cause and the fact that some may have special talents and be of special value as individuals in a political cause ought not to be discriminatory. The parties ought to be free to accept such support without consulting a Plimsoll line of election spending ceilings and without paying a premium for it. [23]

Section 39 of the E.F.R.A. (reproduced above) limits the amount that a party, constituency association, or candidate can spend on commercial advertising in an election campaign to a formula based on the number of voters in the relevant electoral district. Section 38 limits the period of campaign advertising to a three-week slot up to but not including the day before polling day. Although the Camp Commission endorsed the time restriction on election advertising, it expressed serious concerns about limiting the dollar amount that parties, candidates, or constituency associations could spend during election campaigns on media buying. Camp saw free speech concerns (this will be addressed in detail in a later chapter).

To limit the access of a political party to specific media is, to our thinking, to place limits upon free speech and expression. No one would suggest that a candidate for office should be limited as to the number of public meetings he may hold, or the number of voters he may canvass, or how often. Why, then, should a party or candidate be limited -within the specified period of a campaign - as to the number of statements they may make to a mass audience through the media?

A common answer to the question is that limitations could be set so as to equalize the contest between the parties, so that the party with the most money does not command the most time and space in the media. While it might be sportsmanlike to handicap the parties in order to make them equal in strength and resources in an election campaign, it could only be done by a system of arbitrary and artificially applied subsidies for lesser parties on the one hand and/or extreme restrictions upon the major parties on the other, with the result that the contest would not necessarily be more democratic but less so.

The major concern with respect to an inordinate advantage in the finanical resources of one party over another is that such an imbalance allows for the domination of television by the wealthier party. The question then becomes one as to whether there is something unique and peculiar about television, used for political purposes, that does not apply to other media and other forms of political campaigning. No one has seriously suggested limitations on newspaper, magazine, or billboard advertising - nor proposed limitations on printed materials, posters, lawn signs, or on the so-called "gimmicks" employed in campaigns. In the main, many advocates of restriction seek not only global limits for election spending but particular limits on television spending.

In other words, it is being argued that political parties should not be permitted to spend the limited amounts allowed or available as they deem most advantageous to them. The sense of this eludes the Commission. [24]

In addition, Camp saw additional dangers in placing spending restrictions on political parties. Such limits might encourage the development of "private" campaigns (by groups such as U.S. style political action committees, which campaign vigorously for or against particular parties or candidates.) To be effective, spending controls would have to be extended not just to political parties, candidates and constituency associations, but to everyone attempting to campaign in the electoral arena. To do otherwise, according to Camp would be to encourage the channelling of resources through private individuals and groups to evade the spending controls. In analyzing the federal legislation, Camp saw in 1974 what would be a reality in 1983: Ottawa would have to move to plug the "loophole" by restricting the electoral activities of both political parties and non-political groups (this is discussed in detail in a later section). According to Camp:

> In a campaign where spending ceilings are in effect, it may well be in the interests of party to encourage its friends to support it in this manner. A private citizen, for example, may launch a campaign in the press extolling the virtues of free enterprise, or expressing opinions with respect to a major issue in the election. He may do so in consultation with a political party or by acting entirely on his own initiative. Either way, the advertisements are intended to influence voters and, as such, to aid one or more of the parties. Even where spending ceilings are not imposed on election spending, but where the parties must account for their contributions and expenditures, such so-called 'private' campaigns can be used to conceal both. (It might be mentioned here that corporations, unions, associations, or other groups may engage - and have done so - in this practice.)

> In the United Kingdom, such expressions of private opinion are simply disallowed during election campaigns or, when they are not, they must be charged against the parties or candidates they are deemed to support. In the United States, the practice has been the subject of court action based upon the right of free speech. The Federal Act in Canada makes no attempt to deal with it, although it seems inevitable that it must, since both disclosure and the spending ceilings will encourage the practice. It would seem sensible to us not to attempt to forbid private citizens from sounding off on public issues in election campaigns. After all, they may do so on the street corner or they may hire a hall; why not, then, take space in the media? But what they may not do - if the regimens of disclosure and accountability are to remain in force - is specifically endorse a party or a candidate, or specifically oppose the same, on behalf of undisclosed contributors. In short, where the advertisement on behalf of the individual or groups is deemed to be political in nature and relevant to the election campaign, the sponsor, or sponsors, must be identified. If an individual or group purchases media space to endorse or support a party, parties, or candidate(s), the cost of the space must be considered as a political contribution and the donors subject to the regulations governing political contributions. [25]

REBATES TO CANDIDATES

Section 45 of the E.F.R.A. provides for a partial reimbursement of campaign expenses, along with other provisions. The first two parts provide that:

> (1) Every registered candidate in an electoral district who receives at least 15 percent of the popular vote in such electoral district is entitled to be reimbursed by the Commission for the lesser of his campaign expenses for the campaign period as shown on his financial statement of receipts and expenses filed with the Commission in accordance with section 43, together with the auditor's report in accordance with subsection 41(4), or the amount that is the aggregate of 16 cents for each of the first 25,000 voters in his electoral district and 14 cents for each voter in excess of 25,000 in his electoral district.

> (2) In relation to candidates in the electoral districts of Cochrane North, Rainy River, Kenora, Lake Nipigon, Algoma and Nickel Belt, as set out in the Schedule to the Representation Act, the amount determined under subsection (1) shall be increased by $2,500.

The Camp Commission was wary of providing public funds to political parties and candidates. It was concerned that rebates would serve to perpetuate the power of those who have already achieved electoral success:

> To the degree that money provides clout in an election campaign, it would be difficult to apportion public funds among the parties without either favouring the 'ins' and discriminating against the 'outs' or, by arbitrarily treating all parties the same, favouring minority parties at the expense of major ones. [26]

In addition, Camp expressed concern about the possible prophylactic effect of public funding on independent candidates:

> ...it has been a part of our political tradition that citizens outside the party system may seek office as parties of one, representing an independent position. Total public funding would either eliminate the independent as a part of our political process or it must, willy-nilly, allow those seeking mere notoriety or self-aggrandizement access to the process at public expense. One could institute total public funding at the price of prohibiting independents and freezing the present array of parties in place, just as one could construct an alternative model in which, at considerable public expense, frivolous candidates could emerge, or parties of temporary fashion and representing special interests, or parties whose dogma and purpose may be sinister and hostile to the general society. Given total public funding, all of these would survive and flourish on the public purse. [27]

The Commission also raised the concern about funding of parties between election campaigns:

> Total public funding does, at least, do away with the need for financial disclosure and, presumably, with any requirement for accountability since the parties receive their funds as a matter of right. But the question still remains as to how the political parties are to survive between elections. The choices are obvious and limited. Either public funding is continued between elections or the system reverts to prior practice; otherwise the parties could only be maintained in penury between elections. If public funding is to apply only for elections and the parties are otherwise free to finance their operations as best and however they can between elections, then the dangers inherent in the present system remain and are perhaps intensified by the need to build larger party bureaucracies in order to conduct election campaigns in which financial resources are limited. As for the possibility of publicly financing both election campaigns and political parties between elections, we doubt that many who understand and value the party system would find such a solution acceptable. Nor would anyone support it who would reckon the public temper. We believe that a balance must be struck between private contributions to the parties and public funding. Later in this Report we recommend a tax check-off approach, as well as tax credits. In our opinion this will provide a greater opportunity for parties to broaden their base by going out to organize new support. Consequently, the health of the constituencies will be improved and they too will have fresh incentives to solicit funds and maintain strong local organizations. [28]

In the end, the Commission recommended a form of public subsidy that was tied to the amount that the candidate spent during the campaign. The more that the candidate spent over a certain limit specified by the formula set out by Camp, then the less the subsidy from the public:

> ....we recommend a form of limited public funding to reimburse qualified candidates for a portion of their election expenses. The purposes and values of such a policy are to help ensure that credible candidates may mount credible campaigns; to relieve the pressing needs upon parties and candidates for campaign funds; and, as well, through our proposals, to give an incentive to candidates to manage their expenditures in the interests of effectiveness and economy and to provide some deterrent to over expenditure. We would propose, then, that following the election campaign and submission of the candidate's audited declaration of expenses, the following calculations be made: that a candidate who receives a minimum of 15% of the popular vote be reimbursed by the lesser of the audited difference between the contributions he receives and his expenses as disclosed by his return or $7,500 with the qualification that any candidate who spends more than the total of 80¢ for each of the first 20,000 electors in his constituency, and 25¢ for each of the remaining electors, shall have his subsidy reduced by $1 for each $2 by which he exceeds such total. (In the case of candidates from Cochrane North, Rainy River, Kenora and Thunder Bay, the amount of this total and of the possible subsidy will each be increased by $2,500 in consideration of the higher transportation costs involved in these geographically very large ridings.) It is clear from this that the more the candidate spends in an election campaign beyond a certain limit, the less his subsidy from the public treasury. The less the candidate spends, the greater is the proportion of reimbursement in relation to his overall expenditures. [29]

In summary, then, on the issues of spending limits and candidate rebates, the Ontario Legislature refined somewhat the recommendations of the Camp Commission when it enacted the E.F.R.A. but retained the essential spirit of the Camp report.

On spending limits, the Commission (Oliver dissenting) was reluctant to impose restrictions. It suggested

that advertising represented a major part of the campaign budget and that controls on the time during which advertising could be placed would, in effect, help to hold down campaign costs.[30] The legislation does not control campaign spending, except to limit commercial advertising.

On rebates, the Commission proposed a formula which would, in effect, create a type of spending limit by decreasing the amount of subsidy a candidate would receive if that candidate spent over a specified amount. The legislation did not adopt that formulation, although it does provide a small subsidy by way of partial reimbursement of campaign costs to candidates who secure at least 15 percent of the votes cast in a particular riding.

POLICY GOALS OF E.F.R.A.

The minimum spending restrictions and small reimbursement provided by the E.F.R.A. are part of the overall scheme of the Act, which stresses controls over contributions and income tax benefits, rather than spending limits and rebates. According to the Camp Commission:

> What we are looking for is a formula by which political parties will be assured reasonable means for the purposes of meeting their campaign costs and their ongoing organizational expenses without the present heavy reliance upon large corporate or institutional contributions. If such is to be achieved, it can only be done by a mixture of method and means, including tax credits to encourage individual donors, a tax check-off to encourage mass participation in party financing, statutory limits upon the size of all contributions, corporate or otherwise, and given certain qualifying requirements, a degree of public funding of the election expenses of candidates. 31

The Camp Commission (Oliver dissenting) saw the growing rate of election spending as reflecting nothing more sinister than the rising cost of buying media time, lawn signs and the myriad other items needed to run a modern election campaign.[32] However, it was the "mystery and secrecy" surrounding campaign contributions from such shadowy sources as wealthy individuals, corporations, trade unions, or other interested groups, which created the "suspicion and cynicism among citizens about their (democratic) institutions"[33] which was seen as the fundamental threat. Therefore, controlling spending would not get at the heart of the problem but requiring disclosure of contributors and limiting the amount of individual contributions would meet the concerns raised by the Commission. According to Camp:

> It is our intent to set political contributions at reasonable limits, which we believe sufficient to allow for the maintenance of the parties between elections and to generate sufficient campaign funds during elections. It is our purpose to remove from the political process the presence of big money from large and powerful interests. We strongly recommend that the substantial dependence of our political parties upon the substantial contributions of a few be terminated. We propose a system which relies on the support of many, at all levels of society, and in which, in the end result, no particular group or segment can be deemed to wield more influence or bear more of the cost of political financing than another. [34]

The present Election Finances Reform Act achieves in major form the objectives set by the Camp Commission. It broadens the base of party support by limiting the size of individual contributions and, in turn, encourages

additional support by providing a tax credit (under the Income Tax Act)[35] for donors.

Rather than relying on public funds to provide financial support for parties and candidates, the Act creates a minimal reimbursement. The emphasis is on small, private donors to carry the bulk of the weight of supporting political parties. The disclosure rules regarding donors further ensures that public cynicism about the political financing process will be kept to a minimum as all the books are open to the public.

## 2. Federal Legislation

### Introduction

Any amendment of Ontario's election laws should not be undertaken without a review of federal election legislation. The federal law, though similar in several respects to Ontario's legislation, includes a limit on party and candidate spending and provides a more generous rebate to candidates and parties. This section of the report examines the provisions of the federal law and their effects, with particular reference to spending limits and reimbursements.

### Purpose of the Federal Legislation

On August 1, 1974, amendments to both the Canada Elections Act and the Income Tax Act came into effect, signalling a new era for federal campaign financing laws. Grouped under the title of the Election Expenses Act,[36] these amendments were altered again in 1977 and 1983. While discussions concerning improvement of the administrative aspects of the law continue, the fundamental premises on which the law operates remain unchanged.

As enunciated in the 1966 Barbeau Report,[37] which provides the basis for the federal law, the aims of the legislation were: (1) to create a more open administrative system of election financing through disclosure provisions for both contributions and expenditures; (2) to employ ceilings as a method of equalizing the amount of

money candidates might spend on campaigns, and (3) to use a tax incentive program for political donations to increase voter participation in the political process.

While Ontario's legislation was also designed with some of these goals in mind, its overall objectives and its approach to election finance regulation are somewhat different than those of the federal legislation. While the federal act provides disclosure and openness, its primary aim is to lower the cost of elections and to broaden access to political office. Ontario's legislation, through its contribution limitations and disclosure provisions, puts more emphasis on ensuring that no individual or corporation can exert improper influence in the electoral process, as well as to get more ordinary citizens involved in the process. Before any of the federal provisions are adopted in Ontario, these differences in the approach and philosophy of the two electoral financing regimes must be taken into account.

A Summary of the Federal Provisions

This section of the chapter constitutes a very brief outline of the major campaign financing provisions of the Canada Elections Act. More detail concerning the federal law can be found in two earlier publications by the Commission on Election Contributions and Expenses - A Comparative Survey of Election Finances Legislation, 1983 and Canadian Election Reform: Dialogue on Issues and Effects, 1982.

Party Registration and Agency

For the purposes of the Canada Elections Act political parties are now fully recognized as legal entities.[38] The concept of agency was extended in the 1974 Act from the candidate and his "official agent" to the party level. Parties are now also required to have a chief agent, who must be registered with the Chief Electoral Officer. Through the concept of agency, public accountability is imposed upon parties. Any infraction of the Act can lead to prosecution and fines of up to $25,000.

Each new party applying for registration must supply the names, addresses, occupations and signatures of 100 electors who are members of the party. For a party to be registered for any election at hand, its application must be received prior to 60 days before the issuance of the writ for a general election. Party registration will only come into effect, however, if the party has nominated at least 50 candidates for the general election.

Under the Act, the candidate also bears a heavy responsibility to comply with its provisions. If candidates, through their official agents, do not submit accurate reports within the time limits set out by the Act, both the candidate and official agent face investigation and possible prosecution by the Commissioner of Canada Elections.

Controlling and Encouraging Contributions

The Canada Elections Act makes provision for all sources of contributions, including those from individuals, businesses, commercial organizations, governments, trade unions, corporations without share capital other than trade unions and unincorporated organizations or associations other than trade unions. Contributions to both parties and candidates must be channelled through the registered agent of a party or the official agent of a candidate. If the agent cannot identify the class of the contributor in all cases or, when the contribution exceeds $100.00, the name of the contributor, the amount received must be paid to the Receiver General. This provision effectively bans the acceptance of anonymous donations.

As noted above, the aim of the federal law is not to restrict the size or source of contributions, but to provide full and accurate disclosure. As a result, federal parties and candidates may accept donations from sources outside Canada and from provincial wings of federal parties, provided provincial law also permits this. In some provinces, notably Alberta and Ontario, these extra-party transfers are restricted to nominal amounts.

While there is no upper limit on the amounts that may be contributed to registered parties and candidates, the amount a donor may claim in tax deductions is finite. Section 127(3) of the Income Tax Act sets out a formula

whereby the maximum tax advantage of $500.00 is reached with a contribution of $1,150.00. Tax credits are allowed to a maximum of $500.00 for contributions from both individuals and corporations. Since unions do not pay income tax, they are not considered by the tax incentive scheme. Tax receipts can only be issued by the registered agent or the official agent. Given that s. 127(4.1) of the federal Income Tax Act defines contribution as cash or other negotiable instrument, receipts for tax purposes cannot be issued for contributions of services or gifts in kind.

Contributions in the form of the purchase of a ticket to a fund-raising dinner or other party functions are also eligible for tax deduction. In these situations, purchasers are usually notified by the party or candidate that the ticket price includes both a donation and the cost of the function. This cost must be assessed by the registered agent or official agent and agreed to by the Department of National Revenue before tax receipts are issued.

Spending Limits

The objective of placing ceilings on spending is to ensure that, as much as possible, all citizens have an equal chance to get elected to the House of Commons. While the link between campaign expenditures and votes is not as well understood as it might be, most observers recognize that those who spend the most money during a

campaign tend to do better than those who spend the least.[39] The federal act deals with this issue by means of two provisions: (1) overall spending limits for candidates and parties, and (2) a limited time period during which parties and candidates may advertise in the print and broadcasting media.

Section 13.2 of the Act specifies the ceiling on party spending. This amount is set at 30 cents multiplied by the number of names on the preliminary lists of electors in those districts in which the party is running an official candidate. This amount is further indexed with a factor based on the increase in the cost of living. The overall total limit for all 282 electoral districts at the 1984 election equalled $6,391,497 for each registered party having candidates in all 282 districts. This was established by multiplying the amount of 30 cents by the total number of names on the preliminary lists of electors for Canada and indexing the product with the factor published by the Chief Electoral Officer.

Candidate expenditure is limited by section 61.1 of the Act, which sets out a formula to determine the ceiling based on the number of electors on the preliminary lists in the riding which is adjusted by adding 1/2 of the difference between the total of the riding and the national average if less than the national average. These adjusted limits, which are indexed to the inflation rate, are further increased in ridings

where the density of electors per square kilometer is less than ten.

Section 2(1) of the Act provides a definition of "election expenses" as amounts paid and liabilities incurred for the purpose of promoting or opposing, directly and during an election, a particular registered party, or the election of a particular candidate. This definition includes the value of goods and services donated or provided at a price less than their commercial value. If the contributor is in the business of supplying these goods and services, their "commercial value" deemed to be the lowest amount charged by him for an equivalent amount of goods or services. If the contributor is not in the business of supplying these goods and services, a fair market value is used, and the contribution is deemed to be an election expense if the fair market value is equal to or greater than $100. With regard to the question of "volunteer labour", the act defines the service as a contribution by a person made on his own time. Self-employed volunteers cannot perform services for which they would otherwise be paid. If a "volunteer" is nevertheless paid, the value of his work is automatically considered an election expense. Because the definition of election expenses has been drafted in a broad and flexible manner, questions as to whether a particular expenditure falls under the definition arise frequently. To avoid problems in this area, officials

of the office of the Chief Electoral Officer meet with members of an ad hoc advisory committee of party spokesmen to develop guidelines based on the legislation to assist registered parties and candidates in determining which items will be considered election expenses.

Sections 13.7(1) and 61.2(1) set out the advertising restrictions for parties and candidates respectively. Both are prevented from advertising in the media between the date of the issue of the writ and Sunday, the twenty-ninth day before polling day, or on polling day or the day immediately preceding polling day. Section 99.13 of the Act states that every broadcaster should provide no more than six and one-half hours of paid prime time for party advertisements. Under s. 99.15, the legislation stipulates that this time be divided among the parties by the Broadcasting Arbitrator according to the percentage of seats won in the previous election, the percentage of votes received and the percentage of total registered party candidates endorsed by each registered party at the previous general election, with no party receiving more than half the total time. In the 1984 election, the Liberals, Progressive Conservatives, and New Democrats were allocated 173, 129 and 69 minutes respectively. The Rhinocerous Party acquired 8 minutes, while no other party was granted more than 5.5 minutes.

Reimbursements

So long as parties and candidates comply with

reporting and registration requirements, they are entitled to partial reimbursement of expenses under the current federal scheme. When first enacted, candidate rebates were estimated to be about 38 percent of a candidate's expenditures. The rebate formula was tied to the cost of one first class stamp for each elector on the preliminary list in the candidate's riding, plus an adjustment if the total number of electors in the riding was less than the national average.

However, the postal rates for a first-class letter (eight cents in 1974) have quadrupled since the Act was enacted. To keep the rebates within bounds, the basis of reimbursement has been changed. The current legislation has frozen the candidate rebate level at 50 percent of the maximum permissible limit. So long as a candidate has submitted his audited election expenses return and personal declaration to the Chief Electoral Officer, and so long as he has been elected or obtained at least 15 percent of the votes cast in his riding, he qualifies for a reimbursement of 50 percent of his actual election expenses to a maximum of 50 percent of his election expenses limit (see s. 63.1 of the Act).

In addition, the Act provides a generous rebate for parties. Section 99.25 of the Act stipulates that registered parties will be reimbursed for 22.5 percent of their election expenses, provided the party has spent more than 10 percent of its maximum limits.

Disclosure and Reporting

The area of financial reporting at the federal level is ensured through a series of prescribed and administrative procedures designed to expose party and candidate contributions and expenditures to public scrutiny.

The Act requires disclosure of the source of all funds received from contributors and the names of all contributors giving more than $100 in a year to a party or to a candidate at an election. An accounting of the use made of these funds is also required. Six months after the end of the party's fiscal year, a return must be filed with the Chief Electoral Officer. This audited return must contain an itemization of contributions under a number of categories. Within six months of a general election; a statement of party expenses must be submitted. In addition, candidates must file detailed returns after each general election. The returns must be received by the constituency returning officer within four months of polling day.

Before the 1974 reforms, failure to file was common, since the old Canada Elections Act failed to designate a responsible enforcement officer; the responsibilities of the Chief Electoral Officer did not extend to candidate returns and the federal Minister of Justice declined to enforce the legislation, fearing this might be viewed as political harassment. The 1974 amendments created an appointed Commissioner of Election Expenses,

now the Commissioner of Canada Elections. In 1978, the Commissioner's role was expanded to include responsibility for compliance and enforcement of all provisions of the Canada Elections Act. If a candidate or his official agent fails to file returns in accordance with s. 63 (which stipulates the content required in the return), they are not only liable to fines and imprisonment in the event of prosecution and conviction, but are also guilty of an illegal practice, which prevents a person from running at a future election. Since the creation of this enforcement office, candidates have faced the prospect of charges more often, and are therefore more likely to file returns.

Enforcement and Control

Under section 70(3) the Chief Electoral Officer is required to appoint a Commissioner of Canada Elections to perform compliance and enforcement duties. Subsection 70(4) provides that no prosecution for an offence under section 115 of the Criminal Code[40] or for an offence under the Canada Elections Act can be instituted except upon the written permission of the Commissioner.

Some Current Concerns

While the rebate and spending limit provisions of the federal legislation have, on the whole, been

applied with much success, there are two serious shortcomings in the current legislation. The first is the problem of how to define election expenses; the second is the issue of how third parties that wish to participate in the electoral process should be treated.

Those who drafted the Canada Elections Act were careful to provide a broad and flexible definition of election expenses. Such expenses are defined generally as amounts spent or goods and services provided to promote or oppose directly the election of registered parties and candidates. The Act provides a limited list of the kind of expenses -- advertising, rental of space, refreshments, promotional mail, and others -- that fall under this definition. But many other expenses are left to be interpreted by each party according to the guidelines provided by the Chief Electoral Officer. The New Democratic Party, for example, tends to attribute as much of its spending as possible to election expenses, in order to recoup a large 22.5 percent rebate. The Liberals and Progressive Conservatives, on the other hand, use a narrower definition of election expenses, since they are more concerned about staying within the spending limit than reaping a larger rebate. As a result, those expense items which fall on the borderline -- national office expenses, money spent on polls, or fundraising by mail -- are sometimes interpreted by a party in a way that best suits its interests.

Because the nature of election campaigns is constantly changing, it is likely that political parties will always attempt to "cut corners" by means of creative interpretation of the Act. To solve this problem, officials of the Office of the Chief Electoral Officer meet with his ad hoc advisory committee before each election to develop guidelines as to what items will count as election expenses. In Ontario, if spending limits were established, the role of the advisory committee could be played by the Commission on Election Contributions and Expenses. However, a more precise definition of election expenses in the Act would go a long way towards solving this interpretation problem.

But perhaps the greatest concern for administrators of the federal act is how to regulate the activities of third parties during elections. Since restriction of candidate and party spending is a cornerstone of the Act, there have always been guidelines as to what non-parties may spend in their support. In the original act, section 70.1 provided that no one except a candidate or party could incur election expenses. But this broad rule was mitigated by an exception in subsection 70.1(4). According to this section, it would be a defence if a person charged established that he incurred the expense for "the purpose of gaining support for views held by him on an issue of public policy" or for advancing the aims of

any non-political organization in which he was a member and for whom the expenses were incurred -- so long as all this was done in "good faith".

These provisions lasted until 1983, when the Chief Electoral Officer and his ad hoc advisory committee, worried about the growing use of aggressive political tactics by well-funded interest groups, decided to eliminate the section 70.1(4) defence. This amendment was quickly and unanimously enacted on November 17, 1983 as Bill C-169. It received almost no attention until January 16, 1984 when the National Citizens' Coalition and its leader Colin Brown launched a suit against the Attorney General for Canada in the Court of the Queen's Bench of Alberta, challenging the constitutional validity of sections 70.1(1) and 72 of the Act. On June 26, 1984, Mr. Justice Medhurst struck down these two sections of the legislation as being inconsistent with the Canadian Charter of Rights and Freedoms.[41] Though the decision was binding only in Alberta, it received de facto national application when the Canadian government chose not to launch an appeal, in light of the impending 1984 election.

As a result, section 70.1 has become a paper tiger, still in effect in all jurisdictions except Alberta, but unenforced by the Chief Electoral Officer. It is now easier than ever for single-issue organizations and interest groups to go beyond promoting the issues they favour to become directly involved in the support

or opposition of parties or candidates during election campaigns. For now, the legislation will remain ineffectual, until someone sues the Chief Electoral Officer to enforce section 70.1 or until a constitutionally acceptable formula that can close the loophole is devised.

3. Election Legislation in Other Canadian Jurisdictions

Elections are becoming increasingly regulated, but the form of control varies widely. In Britain, for instance, candidates are strictly limited in the amount of money they can spend on election expenses, but there are no controls on parties. British candidates receive no subsidy from the state to offset election expenses. In the United States, Presidential candidates receive massive subsidies in the tens of millions of dollars, but an attempt to set spending limits was ruled unconstitutional by the U.S. Supreme Court. Canadian provinces also have a variety of financial regulation schemes. This chapter considers the control of election finances in the Canadian provinces.

The specific emphasis in this chapter is on election rules regarding spending limits and rebates to candidates and parties. Full information on the extent of election law in the Canadian provinces, the U.S. states, and the U.S. and Canadian federal systems can be found in an earlier publication of the Ontario Commission on Election Contributions and Expenses, A Comparative Survey of Election Finances Legislation, 1983.

While Ontario was a leader in the institution of election finance reform legislation, most of the other Canadian provinces have now followed suit. This section provides a brief outline of election finance law in Canada's provinces, concentrating on provisions regarding contribution limits, spending limits, disclosure and reimbursements. The diversity of approach and scope of these laws demonstrates that debate concerning the most effective means of reform is far from settled in most provincial jurisdictions.

Alberta

The major statute regulating campaign financing in Alberta is the Election Finances and Contributions Disclosure Act,[42] which has been operating since 1978. Like the Ontario law it was modelled after, Alberta's legislation regulates financing by providing for disclosure and limiting contributions.

All funds received by parties and candidates must be reported, both after campaign periods and annually. Constituency associations are required to file only annual financial statements. All amounts in excess of $375 from a single source must be identified by the name and address of the contributor. The return must also list the total amount of all contributions under $40 and the total amount received from a contributor which in the aggregate is between $40 and $375.

Anonymous contributions in excess of $40 cannot be accepted and if the donor cannot be determined, this money must be paid to the Chief Electoral Officer for remittance to the province's Personal Revenue Fund.

A number of provisions circumscribe donations. Section 5(1) of the Act prohibits contributors from donating to the constituency association during campaigns. Contributions can be directed either to a constituency association or party during inter-election periods. Only registered parties, constituency associations and candidates may accept contributions.

Section 15(1) sets limitations on contribution size. The maximum annual contribution limit for donations to parties is $15,000. For constituencies, the limit is $750 to any one association up to an aggregate limit of $3,750. During campaigns, in addition to these amounts a further $15,000 may be given to each registered party and a further $1,500 to any registered candidate up to an aggregate limit of $7,500. These limits apply to all sources including individuals , corporations, trade unions, employee organizations and candidates' personal funds.[43]

Contributions in the form of goods and services must be assessed for the purposes of the Act according to their fair market value at the time. When goods and services are provided for less than market value, the amount of the discount is deemed to be a contribution. For social fund raising functions, the Act sets

out a formula to calculate the extent to which the ticket price or other charge is a contribution. It should be noted that funds raised at functions by other means, such as passing a hat or profits made from the sale of refreshments, are not considered contributions under the Act.

While the provincial Elections Act[44] provides corrupt practice offences related to expenditures (e.g. vote-buying and treating (or entertaining) voters), there is no limit on the amount of money parties and candidates may spend. Both candidates and parties are required to file statements detailing revenue and expenditures at the end of the campaign period.

There are no subsidies or reimbursements in the current election laws of Alberta. However, as in other provinces, there are provisions for public funding through the Alberta Income Tax Act.[45] There are separate tax refund provisions for individuals and corporations. Alberta corporations may not carry forward their tax credit under that plan to subsequent tax years. Individuals may apply for the tax credi- within four years from the year that the contribution was made, however, the credit is only available in the year the contribution was made.

British Columbia

The regulatory scheme governing election financing

in British Columbia is contained in the provincial Election Act[46] and the Income Tax Act and pursuant regulations.[47]

While reform in British Columbia was urged by a Royal Commission Report in 1978,[48] the only changes which have since been enacted relate to tax deductibility for political donations. The province currently places no restrictions on the size of contributions made to any party or candidate or expenditure limitations on the use of these funds. Contributions from outside the province are not prohibited and public disclosure of the names of contributors and amounts given is not required. While party treasurers and candidate agents must keep records which the Ministry of Finance may audit or verify at any time, there is no affirmative duty to report imposed upon agents. The only government reporting is between the contributor seeking a tax deduction and the tax department. However, both candidates and parties are required to file reports detailing campaign expenditures.

Manitoba

Manitoba was long regarded as a pioneer of election finances legislation and was in fact the first provincial jurisdiction to prohibit corporate contributions in 1924. While Manitoba had the broadest disclosure provisions in the country in the 1950's and 1960's, the effectiveness of these reporting

provisions was unsatisfactory, and despite changes in 1970, the Manitoba legislation failed to produce a single prosecution for what appeared to be commonplace occurrences of contravention. As other jurisdictions enacted reforms in the mid - 1970's, Manitoba failed to keep pace with the general tightening of requirements. In 1977 both the Manitoba Law Reform Commission and the Chief Electoral Officer produced reports assessing the value of the Manitoba scheme then in place.

The result of this activity was the enactment of the Elections Finances Act[49] and a totally revised Elections Act[50] in 1980. Companion amendments to the Income Tax Act were also passed.[51]

The overall scheme of these laws compelled the registration of parties and candidates, but not constituency associations. While no limits were set on the size of contributions, the Elections Finances Act contained a number of contribution-related provisions, such as the regulation of the amount of contribution in individual charges for fund-raising functions, the deeming of the candidate's own funds to be contributions for the purposes of the Act, and the formal allowance of corporate contributions.[52] As well, contributions from trust funds or unincorporated associations had to indicate the individual sources and amount making up the contribution. Chief financial officers of parties and candidates were required to

record all single contributions over $25 and contributions from a single source in any year which totalled more than $25.

The 1980 Elections Finances Act also specified limits for certain election expenses such as political advertising. Disclosure provisions involved detailed reporting of contributions and expenditures, with advertising expenditures singled out for special attention by the legislation. The Income Tax Act provided a tax credit for contributions, but the Elections Finances Act did not provide for party or candidate subsidies or reimbursements.

In 1983, the Elections Finances Act underwent drastic amendment. The new law, which came into effect on January 1, 1985, introduced substantive changes to election financing legislation in Manitoba, particularly in the areas of spending limits and reimbursements.

The legislation sets limits on the total election expenses which may be incurred by or on behalf of a political party or candidate. At the time the legislation came into force, total party spending limits in a general election were determined by multiplying 80 cents per voter on all revised voters' lists in all electoral divisions in which the party had endorsed candidates. Candidate spending limits were determined by multiplying $1.25 by the number of names on the revised voters' list. In large electoral

divisions (30,000 square miles or larger), the multiplying figure was raised to $2.00.

The Act also contains spending limits on advertising. When the legislation came into effect, total party advertising expenditures were limited to a figure equivalent to 40 cents multiplied by all names on all the voters' lists in the electoral districts where the party had endorsed candidates. For candidates, advertising limits were determined by multiplying 25 cents by the number of names on the voters' list. These limitations are part of, rather than in addition to, the global spending limits set out above. The Act also includes a formula to vary these ceilings, based on the consumer price index.

Section 56(1) is another innovative addition to Canadian election financing legislation. It seeks to limit the publication of advertising by government departments and Crown agencies during an election campaign. The Act does not cover four categories of advertising: (1) publications and advertising in continuance of earlier publications or advertisements concerning ongoing programs, (2) the solicitation of applications for employment, (3) publications or advertisements required by law, and (4) advertisements deemed necessary by the Chief Electoral Officer for the administration of an election. Anyone who believes these rules have been violated can file a complaint with the Chief Electoral Officer.

The Act contains generous provisions for public financing of both political parties and candidates. Under section 71, all registered political parties which obtained an aggregate of 10 percent or more of all valid ballots cast in all provincial electoral divisions are eligible for a reimbursement. The reimbursement, like the federal scheme, is equivalent to the lesser of 50 percent of the total election expenses permitted or 50 percent of the actual expenses incurred by or on behalf of the party. Section 72 provides that candidates will also be reimbursed for the lesser of 50 percent of their actual or permitted election expenses, if they receive 10 percent of the votes in the electoral division in which they run. When a party or candidate fails to receive the qualifying 10 percent of the popular vote, the auditor's fee to a maximum of ($250) will be paid nevertheless, once all filing requirements are met.

In order to tie compliance in with general reimbursement provisions, the Act stipulates that where a party or candidate exceeds spending limits, reimbursements payable will be reduced by $1.00 for every $1.00 by which actual expenses exceed the limit. Candidates or parties that exceed spending limits may also be prosecuted and are liable on summary conviction to fines not exceeding $2,000 and $20,000 respectively.

The most experimental aspect of Manitoba's reimbursement scheme is, of course, the low 10 percent

threshold placed on qualifying. Opposition to this provision was evident while the Bill was going through first and second readings in the legislature. Many expressed the concern that taxpayers should not be supporting the cost of a candidate or platform rejected by 90 percent of the voters. One report called the subsidy system "...a subsidy for 'Kookie' candidates..." and "...a simple case of politicians being generous to politicians".[53]

New Brunswick

In 1978 New Brunswick enacted the Political Process Financing Act[54] which provided for the regulation of contributions and expenditures, public disclosure, public subsidy of political parties and reimbursements of certain expenses of candidates. The New Brunswick Act has been amended three times since its inception[55] and the 1980 amendments include the allowance of tax deductions up to $500 for donations.[56]

Section 39 of the Act places a limit on contributions. The total value of all contributions made by an individual, corporation or trade union during the calendar year must not exceed $6,000. The party must disclose the names of all contributing trade unions and corporations. Individual contributors giving over $100 must also be disclosed.

Advertising expenditures for the broadcast or print media in non-election years are set by section 50

of the Act at $25,000 in each calendar year for registered parties and $200 in each calendar year for registered district associations and registered independent candidates. This limitation does not apply to advertising which merely publicizes the date, time, place or program of a scheduled public meeting. There is no specific limitation with respect to advertising expenditures in an election year providing that it is within the overall limits imposed by the Act.

Section 77 of the Act limits global expenditures. In the case of registered parties, global election spending limits cannot exceed 85 cents multiplied by the total number of voters in all the electoral districts where the party has candidates. The candidate limit is obtained by multiplying $1.50 by the number of voters in the electoral district. The law further provides that in no case can expenditures be limited to an amount less than $7,500 nor can they exceed the amount of $20,000.

Public funding is provided by an annual subsidy paid directly to the registered political parties and in the form of partial reimbursements of candidates' election expenses. Section 31 of the Political Process Financing Act stipulates that every registered political party represented in the Legislative Assembly or which had at least ten candidates in the preceding election qualifies for the yearly subsidy. The subsidy is calculated by multiplying the total number of ballots cast

for a party's candidate by an amount adjusted for inflation from a 1981 figure of $1.31. Section 34 of the Act stipulates that this money be used to pay the costs of administration and development of programs and activities of an ongoing nature.

Once candidates have complied with all reporting requirements, they become eligible under section 78 of the Act for partial reimbursement of election expenses. The threshold to qualify is set at 20 percent of the votes cast in the candidate's electoral district. The amount of the reimbursement is the lesser of the candidate's expenses or the sum of 35 cents multiplied by the number of electors in the district and the cost of mailing a first-class letter to every constituent.

Newfoundland

Draft legislation with respect to comprehensive campaign finance laws has been under consideration by the Newfoundland government for close to three years.

Currently, Newfoundland's Election Act[57] deals to a minor extent with election expenses, and not at all with political contributions. There is no requirement that a candidate name an official agent, and accountability for the acceptance of contributions rests with no one individual in particular. The existence of parties or constituency associations is not contemplated by the Act. Expenditures and costs are

governed by rules against prohibited payments such as treating. The Elections Act does provide for the submission of detailed statements concerning candidates' election expenses. These statements must be submitted to the Minister of Justice within a four-month period, and this material is available for public inspection.

This skeletal legislation was reviewed by a Select Committee on Elections, which studied draft legislation, canvassing most of the approaches in other Canadian jurisdictions. As of yet, however, no new legislation has been forthcoming.

Nova Scotia

Nova Scotia has enacted comprehensive legislation regarding expenditures and, with the introduction of tax deductible provisions in 1981, has added reporting and record-keeping provisions to this.

In contrast to the Ontario Act, Nova Scotia's Elections Act[58] puts no limits on contributions. Instead, the Act concentrates on spending limits. Section 164A of the Act puts a ceiling on party spending equivalent to 40 cents multiplied by the number of voters in all electoral districts in which the party has candidates. Candidate limits must not exceed the total of one dollar for each of the first 5,000 voters, 85 cents for the next 5,000 and 75 cents for every voter over 10,000. In addition spending limits are tied to the consumer price index.

One weakness of the Nova Scotia Act is the absence of express provisions for public disclosure of individual contributors. The Chief Electoral Officer does provide forms to be used by official agents to record contribution-related information. As well, auditors are required to report total contributions for which receipts were issued. However, individual contributions and contributors escape scrutiny. The need for amendments in this regard is illustrated by the plethora of illegal payment scandals in recent Nova Scotia politics. Despite this flaw in current legislation, reports and expenditures are detailed, and these reports are made public.

Nova Scotia reimburses a portion of candidates' expenses. The qualification threshold (set out in section 164B of the Act) is 15 percent of votes cast. After expenditure reports are filed, the Chief Electoral Officer is required to remit 75 percent of the reimbursement to the candidate immediately once he is satisfied that expenses of at least this amount have been incurred. The remaining 25 percent of the reimbursement is held back until the Chief Electoral Officer is certain that all expenditure reports and claims are accurate. The amount of the reimbursement is equivalent to 25 cents multiplied by the number of electors on the official voters' list for the candidate's district.

Prince Edward Island

On June 23, 1983, a new regime of election financing legislation was given Royal Assent for Prince Edward Island. The new Election Expenses Act[59] which at this time of writing is expected to be proclaimed soon, provides for several of the substantive reforms enacted earlier in other jurisdictions.

Section 8(1) of the Bill places a global spending limit on party expenditures during a campaign. This limit is equivalent to $4.25 multiplied by the number of electors in the province. Candidate expenditures are limited to the equivalent of $1.25 multiplied by the number of electors in the electoral district, to a maximum of $12,000. If the number of electors is less than three thousand, then the maximum limit is $6,000. Section 9 (3) of the Act allows for indexing of these limits with the consumer price index.

Candidate reimbursement schemes appear in section 10(1) of the Act, and impose a qualifying threshold of 15 percent of the votes cast in the district. Under the legislation, the amount of the subsidy shall not exceed 32 cents for each elector whose name appears on the official list of electors to a maximum of $1,500 and a minimum of $750. The amount of reimbursement is also tied to the consumer price index.

Section 23(1) of the legislation allows for an annual party subsidy equivalent to multiplying the

total number of votes cast for a party in the general election by a figure not exceeding one dollar. The determination of the actual amount is left to the Lieutenant Governor in Council in consultation with the leader of the opposition.

Where a contribution of more than 25 dollars is made to a registered party and the contributor requests a receipt for this contribution, the contributor may claim a tax credit according to the formula set out in the Income Tax Act of the province.[60] The name and address of contributors shall be recorded by the official agent of the party or candidate if a single contribution exceeds $250 or if annual contributions from a single source exceed $250 in the aggregate.

Quebec

In 1963, the province of Quebec became the first electoral jurisdiction in Canada to restrict party campaign expenses and institute candidate reimbursements.[61] These laws were revised in 1977 with the introduction of the Loi Regissant le Financement des Partis Politiques.[62] Since then, amendments have been made in 1978, 1979, 1982 and 1985. The Taxation Act[63] was also amended in 1977 to implement individual tax incentives for political donations.

Contributions are strictly regulated. Only individuals may contribute to parties, district associations and candidates, and the annual aggregate limit on

individual donations is set at $3,000. Corporations are prohibited from making donations. This severe prohibition on the source of funds is unique in Canada. While volunteer work, small anonymous donations at political meetings and annual party membership fees under $50 are exempted from regulation, goods and services are generally considered contributions for the purposes of the Act.

Detailed reporting of contributions and expenses is required of all authorized parties, associations, and candidates. Information in financial returns of contributions over $100 is made public.

The Act contains a number of provisions regarding spending limits. In order to make spending limitations meaningful, section 406 of the Act makes prewrit expenditures for advertising and campaign literature subject to the provisions of the Act. Party spending limits provide that aggregate expenditures must not exceed the equivalent of 25 cents per elector in all electoral divisions in which the party has a candidate. Candidate ceilings are set at 80 cents per elector in the contested district. Several large electoral districts have had their spending limits increased by varying amounts in section 450 of the Act.

The public funding provisions of the Quebec Act are perhaps the most extensive in Canada. The Act invokes the three major pillars of subsidy schemes by legislating tax incentives, reimbursement of candidate

expenses and global party subsidization.

Quebec's tax deduction scheme for political donation is less generous than all other jurisdictions providing similar tax incentives. Section 776 of the Taxation Act allows deductions of 50 percent for the first $280 contributed.

Candidate reimbursement is calculated at 50 percent of actual expenses. To qualify, the candidate must either be elected, obtain at least 20 percent of the valid votes cast, have won election previously in the last general election, or represent either of the two parties which garnered the most votes in the election in that district.

Section 358 of the Act requires the Director General to pay an annual allowance to every authorized party represented in the National Assembly. The amount (25 cents multiplied by the number of electors on the revised electoral list) is distributed proportionately with party representation in the Assembly. Section 361 directs that the amount be used for the costs of party administration, the dissemination of party policies and programs and the political activities of party members.

The most recent amendment of the Act made Quebec the first province to take spending restrictions out of the ambit of the new Charter of Rights and Freedoms.[64]

Saskatchewan

The elections legislation currently in place in Saskatchewan provides extensive controls over election financing. The first legislative efforts in this regard were enacted on May 10, 1974 as amendments to the existing Election Act.[65] There have been three major amendments since, in 1976, 1978 and 1980-81.

There are no limits on the amount of money that can be contributed, although sections 210(2) and 218(1) direct that donations over $100 must be disclosed as to source and amount and section 220 prohibits contributions from outside of Canada. Section 221 prohibits anonymous donations, and any such donations received which cannot be returned must be paid over to the province's Consolidated Fund.

There are limits on both candidate and party spending. During an election, each candidate is allowed to spend an amount fixed by section 214 or an amount determined when a statutorily fixed amount is multiplied by the number of names on the voters' list, whichever amount is larger. These limits are indexed to the inflation rate. Party expenditure limits are set by section 208(1) of the Act. Before 1981, this limit was fixed at $250,000. This figure is now adjusted annually with the consumer price index.

Certain expenditures, such as partisan advertising between elections, are also regulated by the Saskatchewan Act. The total expenses incurred either directly or

indirectly by a party for newspaper, magazine and media advertising in the province in a fiscal year cannot exceed a specified amount. Starting at a 1981 base figure of $98,228, this limit is adjusted annually.

Candidate reimbursements are based on a threshold of 15 percent of the popular vote in an electoral district. The amount of the reimbursement is set at 50 percent of the candidate's lawfully incurred election expenses. If the party obtains 15 percent of the votes cast, the party is also eligible for reimbursement. This rule has been rigidly applied. The Liberal Party missed the cut-off by 1.3 percent after the 1978 elections and was accordingly denied its reimbursement, despite arguments that the threshold figure was merely designed to discourage "fringe" parties. The amount of the party reimbursement is calculated by section 223(1) as the lesser of an "adjusted amount" of $98,228 (1981) and one-third of the amount of election expenses lawfully incurred on behalf of the party and within the spending limits imposed by section 208.

Finally, section 229 of the Act restricts the Government of Saskatchewan from advertising during an election campaign, unless such advertisements are necessary in the public interest or of an emergency nature.

## SUMMARY AND CONCLUSIONS

### CONTRIBUTION AND EXPENSE LIMITS

Canadian legislative opinion has been divided as to whether equity amongst political competitors can best be secured through constraints on contributions or by means of overall spending ceilings. Ontario and Alberta have opted for controlling the size of contributions to parties, candidates or local constituency associations. Quebec has gone further, restricting donations to registered eligible voters in the province. But most jurisdictions have used spending limits as the means to control election expenses. In addition to the federal legislation, the provinces of Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, Quebec and Saskatchewan impose spending limits on candidates and/or parties, (Ontario sets a per voter limit on commercial advertising expenditures only).

The most serious weakness of spending limits is the problem of defining the concept of election expenses, which are generally defined vaguely as amounts spent to promote or oppose the election of registered parties and candidates. An additional problem is that these controls apply only from the date of issuance of the writs of dissolution to polling day.

REIMBURSEMENTS, TAX CREDITS, AND GRANTS

In order to decrease the dependence of parties on private interests for funding, most jurisdictions have attempted to provide an alternative source of money for serious parties and candidates. Three devices have been employed: (1) subsidies from the federal and provincial treasuries in the form of reimbursement of part of the election expenses incurred by qualifying candidates and parties, (2) tax credits (or deductions) to stimulate donations to party and candidate funds, and (3) grants to the parliamentary and legislative caucuses of parties represented in the elected chambers.

Today, some form of candidate reimbursement exists in the provinces of Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, Quebec and Saskatchewan. Based either on a sliding scale or a fixed amount per voter, or as a portion of actual cost incurred, these reimbursements are given to candidates and parties which have gained either 10, 15 or 20 percent of the votes cast.

FOOTNOTES - PART I

1. The Progressive Conservatives failed to win an absolute majority of the seats in the Ontario Legislature in the elections of 1943, 1975 and 1977.

2. R.S.O. 1980, c. 134.

3. See J. Patrick Boyer, Political Rights: The Legal Framework of Elections in Canada (Toronto: Butterworths & Co., 1981), Table of Statutes at 326.

4. R.S.O. 1980, c. 418.

5. R.S.O. 1980, c. 232.

6. R.S.O. 1980, c. 84.

7. R.S.O. 1980, c. 235.

8. R.S.O. 1980, c. 133

9. R.S.O. 1980, c. 134

10. Ontario Commission on the Legislature, Third Report, (September 1974), Dalton Camp, Chairman.

11. Commission on Election Contributions and Expenses, Report of the Commission, Canadian Election Reform: Dialogue on Issues and Effects.

12. Third Report, op. cit., p. 32

13. Ibid. p. 40

14. Ibid. p. 23

15. Ibid

16. Ibid. preface

17. Ibid. p. 12

18. The full five volumes of the Camp Commission report set out a comprehensive study of the Ontario Legislature. Notes on the Commission and its influence in the structure of the current legislation can be found in several C.E.C.E. studies, notably: The Commission: Ten Years Later (Reflections on Political Financing in Ontario) (1985) and Canadian Election Reform: Dialogue on Issues and Effects (1982).

19. See, for instance, J. Patrick Boyer, Money and Message: The Law Governing Election Financing Advertising, Broadcasting, and Campaigning in Canada (Toronto: Butterworths & Co., 1983): Boyer, Political Rights , supra note 3; and the C.E.C.E. studies in note 18.

20. In the transmittal letter signed by the three Camp commissioners, conveying their third report on election finances to the Speaker of the Legislative Assembly, Liberal appointee Farquhar Oliver added this dissent:

> "I am in full agreement with the recommendations of this Report, with the qualification that there should have been a recommendation for ceilings on party and constituency expenditure in an election campaign. This would, in my judgment, have added materially to the full effect of our proposals."

21. Ontario Commission, supra note 10, at 8.

22. Ibid at 16.

23. Ibid at 17.

24. Ibid at 19-20.

25. Ibid at 21-22.

26. Ibid at 10.

27. Ibid

28. Ibid at 11.

29. Ibid at 40.

30. Ibid at 19.

31. Ibid at 12.

32. Ibid at 1.

33. Ibid

34. Ibid at 31.

35. R.S.O. 1980, c. 213, as amended

36. S.C. 1973-74, c. 51 as amended by S.C. 1977-78, c.8

37. Report of the Committee on Election Expenses (Barbeau Report) (Ottawa: Queen's Printer, 1966)

38. S.13, Canada Elections Act

39. Courtney, John C. Unpublished paper presented as evidence in the case of National Citizens' Coalition v. Attorney General for Canada by the Attorney General, April 1984, pp.19-20

40. Section 115 provides that anyone who wilfully and without lawful excuse contravenes an Act of Parliament, unless some penalty is expressly provided by law, is guilty of an indictable offence and liable for imprisonment for two years.

41. National Citizens' Coalition v. Attorney General for Canada (1985), 11 D.L.R. (4th)at 481.

42. R.S.A., 1980, c.E. - 3

43. S. 15(4) of the Alberta Act declares all money paid by candidates out of their own funds for campaign purposes to be a contribution.

44. R.S.A., 1980, c. E. - 2

45. R.S.A., 1980, c. A. - 17

46. R.S.B.C., 1979, c. 103

47. R.S.B.C., 1979, c. 190 and "Political Contribution regulations", B.C., Reg. 340/79

48. Report, Vol. IV, Royal Commission on Electoral Reform, 1978, (Victoria, 1978)

49. S.M., 1980, c. E. - 32

50. S.M., 1980, c. 67

51. R.S.M., 1970, c.I. - 10 as amended by S.M. 1980,c.78

52. While section 126 of the old Elections Act prohibited corporate contributions, it only seemed to apply during election periods, allowing for an inter-election loophole. See Manitoba Law Reform Commission, Working Paper on Political Financing and Election Expenses (Winnipeg, February, 1977)

53. Kooky Subsidy: Sudbury Star, June 24, 1983

54. S.N.B., 1978, c.P. - 9.3; as amended by S.N.B., 1978, c.82; S.N.B., 1979, c. 41; S.N.B., 1980, c. 40

55. Ibid.

56. Income Tax Act, R.S.N.B., 1973, c. I - 2; as amended by S.N.B., 1974, c. 21 (Supp.); S.N.B., 1975, e.c. 29880; S.N.B., 1977, c - 15; S.N.B., 1978, cc. 29; S.N.B. 1979, cc. 35841; S.N.B., 1980, cc. 26832

57. R.S.N. 1970, c. 106, as amended

58. S.S.N.S., 1967, c. 83; as amended by S.N.S. 1981, c. 21

59. Bill No. 53, 32 Elizabeth II, 1983

60. R.S.P.E.I., 1974, Cap. I - 1

61. S.Q., 1963, c. 13

62. R.S.Q., 1977, c. F - 2, as amended by S.Q., 1978, cc. 6 and 13; S.Q., 1979, c. 56; S.Q., 1983, cc. 31 and 54

63. R.S.Q., 1977, c. I - 3, as amended

64. S.Q., 1982, c. 2(a) S. 125

65. S.S., 1973 - 74, c. 36, now cited as R.S.S., 1978, c. E. - 6, as amended.

# PART II

## REGULATION OF LEADERSHIP CAMPAIGNS

## 4. Election Finance Reform and the Charter

### Introduction

Election finance reform legislation has always had an uneasy co-existence with guarantees of fundamental freedoms. In January, 1976, for example, the United States Supreme Court struck down a number of Congress' sweeping electoral reforms as unconstitutional, before they could be tested in a national election.[1] In July, 1984, a Calgary judge[2] used the freedom of expression guarantee in the Canadian Charter of Rights and Freedoms to strike down a contentious amendment to the Canada Elections Act.[3] These decisions may well indicate that before changes are made to Ontario's election legislation, there is a strong possibility that any new provisions could infringe the Charter. This chapter provides a preliminary analysis of the areas where election finance legislation may be declared unconstitutional. The provisions investigated here include spending limits, public subsidies, and disclosure rules.

### The Charter and Spending Limitations

#### A. Buckley v. Valeo

As soon as the 1974 American electoral reforms came into effect, they were challenged in a large lawsuit comprising a number of diverse conservative and liberal plaintiffs, reported as Buckley v. Valeo.[4] The basic argument of the plaintiffs was that the limit

placed on campaign contributions and expenditures violated the freedom of donors and candidates to "express themselves in the political marketplace."[5] It was also contended by the liberals joining suit that the public financing provisions discriminated against minor parties and lesser-known candidates in favour of the major parties and better-known candidates.

In its decision, the court found that the disclosure requirements, contribution restrictions and public financing provisions were valid. On the other hand, the court held that restrictions on individual independent expenditures in support of a candidate, limits on a candidate's use of his own funds, and general spending limits on candidates violated the First Amendment guarantee of free speech. As the court stated:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quality of expression by restricting the number of issues discussed, the depth of their exploration and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.[6]

The court did, however, authorize the use of spending ceilings for candidates who chose to accept public subsidies. As a result, spending limits are now only effective in those American jurisdictions which provide

public financing for parties and candidates.

The greatest impact of the Buckley decision has been its effect on the ability of independent groups to spend unlimited sums of money in support of a particular candidate while the court recognized in its decision that this might occur, nevertheless this argument was not sufficient to justify any limitation in this regard under the strict test applicable to legislation concerning so fundamental a right as political expression. The result has been the well-documented growth of "political action committees" (PAC's). In 1980, for example, these 'independent groups' exerted substantial influence, spending about $6 million backing Ronald Reagan, while Jimmy Carter received only about $18,500 in PAC support.[7]

B. The Canadian Situation

Spending limits on parties and candidates apply during elections at the federal level and in six Canadian provinces (see part 3, above). So far as is known, these general spending limits have never been challenged in the courts, and it is unlikely that such a challenge would be successful. In all the Canadian jurisdictions which enforce spending limits, public subsidies are provided and under the Buckley rule, parties which accept public funds are deemed to have voluntarily accepted the spending ceiling.[8]

Furthermore, though American case precedent is becoming increasingly relevant in post-Charter Canadian jurisprudence, it is uncertain whether the Buckley rule could be successfully applied in Canada, given our different political and legal traditions. While Buckley reflected the customary American priorities of free speech over other values, a Canadian court would most probably take a more even-handed approach, perhaps recognizing our traditional emphasis on peace, order and good government as having priority over individual rights.

As a result, the imposition of overall spending limits in Ontario might not be judged by the courts to be an infringement of the Charter's freedom of expression guarantees.

The constitutional validity of setting spending ceilings on third parties is, however, quite another matter. As noted above, federal legislation limiting third party spending was declared unconstitutional in National Citizens' Coalition Inc. et al v. Attorney General for Canada.[9] In that case, Medhurst, J. decided that the danger of abusive third party spending was not significant enough to justify the amendment as a "reasonable limit" under section 1 of the charter. Mr. Justice Medhurst had this to say:

> Care must be taken to ensure that the freedom of expression, as guaranteed by s. 2 of the Charter, is not arbitrarily or unjustifiably limited. Fears or concerns of mischief that

> may occur are not adequate reasons for imposing the limitation. There should be actual demonstration of harm or a real likelihood of harm to a society value before a limitation can be said to be justified.[10]

He stated further that "there was very little factual evidence of the abuses of s. 70.1 (the bona fide defence) to support the recommendation that had been made by the Chief Electoral Officer."[10]

Three points should be noted concerning this case. First, it must be remembered that Mr. Justice Medhurst was not simply following American precedent in his decision. In fact, he went out of his way to say that:

> While there is some value to be gained by referring to American decisions or similar constitutional pronouncements, this must be considered in the light of the differences that exist between the two countries.[11]

Secondly, because the decision was not appealed for reasons of practical politics, its weight as a precedent is uncertain. Because the federal government invested a great deal of money and effort in defending the action, bringing in political and legal scholars from across North America as expert witnesses, it is certain that under normal circumstances the case would have been appealed. The Chief Electoral Officer, Jean-Marc Hamel remains convinced that such an appeal would have succeeded and continues to hope that the issue will soon be litigated again.[12]

Thirdly, although Ontario's legislators may hesitate to limit third party spending at a time when the law regarding this issue is so unsettled, it should be noted that the courts may be more sympathetic if the legislation is approached in a different manner. In his decision, Mr. Justice Medhurst stated that Mr. Hamel had suggested two solutions to prevent abusive third party spending: (1) eliminate the s. 70.1(4) bona fide defence, or (2) rewrite s. 70.1(4) in a more specific manner preserving the right of third parties to express themselves while maintaining the intent of the legislation. Mr. Justice Medhurst noted tersely that "Parliament chose to eliminate the defence," implying that if it had taken the other route, the legislation might not have violated the charter.[13] This may be an important consideration for Ontario's legislators in drafting any amendments.

C. The Charter and Public Financing

The public funding of candidate election expenses has been accepted by a number of Canadian jurisdictions and until this year little thought was given to its constitutional validity. In 1985, however, public subsidy provisions were challenged twice under the Charter, on two separate grounds, once in Manitoba and once in Ontario.

The Manitoba Challenge

A short time after Manitoba's Election Finances Act[14] was proclaimed in January, 1985, Murdoch McKay and others brought an application arguing that the new subsidy provisions contravened subsections 2(a) and 2(b) of the Charter. Subsection 2(a) guarantees freedom of conscience and religion. Subsection 2(b) enshrines freedom of thought, belief, opinion and expression. The applicants claimed that the new provisions required them, as taxpayers, to subsidize an opinion or political party with which they did not agree.

The applicants lost at the lower court level. On appeal, the Court of Appeal of Manitoba upheld this decision. In a two-to-one opinion, Mr. Justice Twaddle for the majority, held that the subsidies did not restrict subsection 2(b) freedoms of thought or expression, but in fact used public money to facilitate and enlarge public discussion.[15] On the question of the subsection 2(a) freedom of conscience, Twaddle, JA stated:

> The financial support given to a political candidate or his party cannot be attributed to any particular tax or to a payment by a particular individual or group... . The citizen pays a tax: the state uses it not as the citizen's money, but as part of a general public fund.[16]

The court ruled strongly in the Buckley decision to justify its findings under both subsections 2(a) and 2(b). While it is possible that this case may be

appealed to the Supreme Court of Canada, it is unlikely that the court would declare the subsidy provisions invalid for these reasons since this would pave the way for any taxpayer who disagreed with his government's expenditures to refuse to pay his taxes. As the court in Buckley pointed out, "every appropriation made by Congress uses public money in a manner to which some taxpayers object."[17]

The Ontario Challenge

Section 15 of the Charter came into force on April 17, 1985. This section declares that every individual is equal before, and under the law, and has the right to equal protection and equal benefit of the law without discrimination. Two days after its enactment, during the 1985 Ontario election campaign, an election candidate, Mr. Gregory Vezina, challenged the candidate subsidy provision of Ontario's Election Finances Reform Act.[18] He argued that the payment of a subsidy only to those candidates who received 15 per cent of the vote was a violation of sections 15 and 2 of the Charter. Mr. Vezina asked for a declaration either that (a) the candidate subsidy provision was invalid or that (b) he be allowed to share in the subsidy program regardless of his percentage of the vote.

This case may never reach the courts, as it appears uncertain now whether Mr. Vezina wishes to pursue his

action. The challenge does raise some interesting issues, however. There is no doubt that under the subsidy provisions the candidates who receive less than 15 per cent of the votes are not being treated in the same way as candidates who garner 15 per cent of the votes. It can be argued that this is a reasonable limit, as contemplated under section 1 of the Charter. This argument has two parts. Firstly, all candidates should not receive funding, because this would be too open and haphazard a manner of allocating a scarce resource, and secondly, assuming that a threshold must be established, it is the legislature, and not the courts, which is best suited to do this.

The argument on the other side is also convincing. The parties which form the government and set the threshold have a vested interest in ensuring that it is high enough to prevent smaller parties from getting the subsidy. This provides an effective means for large parties to build up their own funds, while new parties are prevented from securing the means to present their ideas to the public. Thus, it could be argued that there should either be no subsidies at all, or that they should be given in equal amounts to all candidates nominated by an accredited political party.

Though dormant for now, the issue is likely to arise again. If it does, political theorists on both sides will no doubt argue whether the government should encourage the growth of fringe parties or whether the

stable two or three-party systems that have dominated Canadian political history should be reinforced.

D. Disclosure Requirements

While disclosure requirements have not been challenged in Canada, it is possible that a contributor to a small political party may bring an action alleging that mandatory disclosure violates his rights to freedom of association guaranteed under subsection 2(d) of the Charter. In Buckley, for example, the court, while upholding disclosure provisions, said that minor political parties would not be required to provide the names of campaign contributors when there was a "reasonable probability" that they would be subjected to "threats, harassments or reprisals."[19] Subsequent rulings have used that standard in the U.S. to exempt various political groups from disclosure provisions. It should be kept in mind however, that the doctrine of protection of privacy, upon which most of these cases have been decided, is far more well-developed in the United States than it is in Canada.

## II Regulation of Party Leadership Campaigns

### I The Need for Regulation

#### A. Introduction

This part of the report will discuss whether there is a need for public regulation of party leadership campaigns. After briefly outlining the history of leadership campaigns in Canada and Ontario, this chapter will discuss two justifications for public regulation of these campaigns: 1) that they are too important not to regulate, and 2) that they are partially funded by the public purse. Following that, the extent of existing regulation, both within the parties themselves and externally will be considered. The chapter will conclude with an outline of some of the dangers inherent when leadership campaign financing is not regulated.

#### B. The Roots of Canada's Leadership Selection Process

The Canadian leadership convention, like so many other aspects of Canada's political, cultural and socio-economic environment, developed from a unique blending of British and American political traditions. By briefly examing the British and American models, the Canadian process can be better understood.

While the major features of Canada's government are modelled after the British parliamentary system, our leadership selection process is quite different from that followed by Britain's major political parties. In

both the Conservative and Labour parties of Great Britain, the leader of the party was until very recently chosen by the parliamentary wing of the party only. The Conservative Party, for example, selected its present leader, Prime Minister Margaret Thatcher, in a 1975 secret ballot vote of the parliamentary wing of the party. The Labour Party chose its leaders in this fashion until 1980, when Michael Foot was elected leader. The new process for the Labour Party has a more complex formula for selecting the leader, which includes voting by the parliamentary wing, trade unions, constituency parties and affiliated socialist societies, all having a certain weight vote at the convention. The new S.D.P. - Liberal alliance has gone a step further, allowing a vote of most of the party membership to select the leader.

In contrast to Britain's slow move from traditional leadership selection to a more participatory form, the United States presidential candidate selection has always been a very public process. In what has been described as "the quadrennial Presidential Olympics,"[20] candidates compete in primaries and caucuses held throughout the country. They attempt to obtain the majority of plurality of votes in a given state and thus all or a percentage of the state's delegates to the party national convention that will choose the presidential candidate. The process begins in January of a presidential election year and lasts for six months.

It is long, expensive and in reality requires candidates to begin campaigning years before the first caucus or primary in order to develop a national profile and to raise sufficient funds to be considered a serious candidate.

The Canadian leadership selection process has adopted aspects of the British and American systems. Until the Liberal Party convention in 1919, Canadian party leaders had been chosen, in the British manner, by a vote of the party's parliamentary caucus. In that year, spurred on by their retiring leader, Sir Wilfred Laurier, the Liberals first used a national convention to elect their leader. The Conservatives, mainly because they were the governing party, retained the caucus method to choose Arthur Meighen as their leader in 1920. Following their 1926 defeat and Meighen's resignation, the Conservatives followed the Liberals' example to select their new leader in 1927. Since that time, with only one exception,[21] the national convention has been the established body for leadership selection in both these parties. In addition, there has been a steady trend toward a broader representational base and lessening of caucus control at such conventions. In the third major party, the New Democratic Party, leadership review at regular conventions has been in place since the party's inauguration as the Cooperative Commonwealth Federation in 1933.

Canada's unique form of party leadership convention had its origins in Ontario at about the same time that it was first introduced in federal politics. Both the Liberal and Conservative parties used conventions to select their leaders, beginning in the 1920's. In fact, the Ontario Conservatives acted before their federal counterparts, choosing Howard Ferguson (later to be Premier) as their leader in a 1920 convention. At that time, they adopted an important resolution:

> It is hereby resolved, that when the permanent Leadership of the Liberal - Conservative Party in Ontario becomes vacant, the Liberal - Conservative Association of Ontario shall, at earliest convenience, summon a Provincial Convention, representative of all the Party forces, to select the permanent provincial leader.[22]

Ontario's third major party, the N.D.P., has, as its national counterpart, held leadership conventions since its 1933 C.C.F. origins. Leadership conventions have evolved since those early days to occupy centerstage in Ontario's political arena.

C. The Importance of Modern Leadership Campaigns

The first half of the 1980's has proven to be an almost unprecedented period for the number and size of leadership conventions. At the federal level, both the Progressive Conservatives and the Liberals have crowded into Ottawa's Civic Centre to select new leaders. In Ontario, all three major parties have held leadership conventions within the last

three years. This flurry of conventions, matched by a number held in other provinces, has brought home the fact that party leadership campaigns are playing a more significant role in our political process than ever before.

The growth in the importance of leadership campaigns appears to be the result of two inter-related factors: (1) broader participation in leadership selection, and (2) the increased power of the Prime Minister and party leaders as compared with the ordinary Members of Parliament.

Ever since the first leadership convention took leadership selection beyond the caucus, there has been a steady trend towards allowing more and more delegates to participate in the process. In Quebec, the Parti Quebecois has taken the convention to its democratic ideal, allowing all party members to vote. In other jurisdictions, conventions have become three-day media extravaganzas, the culmination of campaigns that may last for months. To attract delegates, serious candidates must spend a lot of money. Judging from recent experience, a serious contender for the federal Liberal or P.C. leadership needs about $1.5 million to run a successful campaign.[23] In Ontario, for the race to replace Frank Miller, most observers felt it would cost much more than $500,000 to make a good showing.[24]

At the same time, the gradual "presidentialization" of the office of the Canadian Prime Minister, and to

a lesser extent Ontario's Premier, has augmented the role of the party leader. The combination of rigid party discipline and television's "image politics" has placed more emphasis on the leader than on the candidates or party. In the past, a caucus-oriented leadership selection process emphasized political experience and thus strengthened Parliament itself. But as Professor John Courtney points out in his book on the subject, leadership conventions have brought about a major reorientation of the path to political power:

> ...prior to the introduction of leadership conventions Canadian party leaders typically were men of parliament... Since the change to leadership conventions, however, the main parliamentary experience of Conservative and Liberal leaders at the time of their selection has been nearly half of what it had been in the pre-convention period.[25]

Some aspiring political leaders now feel that the best route to high office is through the leadership convention, rather than a long apprenticeship in Parliament. Recent successful leadership campaigns by men such as Pierre Trudeau, Brian Mulroney and John Turner, who had less parliamentary experience than their major contenders, provide evidence of this trend.

The growing importance of leadership campaigns

is quickly becoming a matter of concern for academics, the media, politicians and the Canadian people in general, as they realize that a small group can make decisions which profoundly affect the public -- the recent selection of one Prime Minister (John Turner), several premiers (Frank Miller in Ontario, Pierre-Marc Johnson in Quebec and Donald Getty in Alberta), though subject, of course, to electoral veto, has emphasized the power of party delegates and the need for more public participation in the leadership selection process. This was especially evident in the January, 1985 convention of the Ontario Progressive Conservatives, where the party chose Frank Miller, though polls showed Roy McMurtry to be the public favorite.

Both of the two older federal parties are studying the possibility of adopting some variation of the U.S. primary system or the Parti Quebecois model to elect their leaders.[26] And a number of recent editorials have argued that today's leadership campaigns have become far too important to leave unregulated. The Toronto Star, in a September 25, 1983 editorial, stated prophetically:

> Consider what happens if the Tories form the next government. Four of the leadership candidates -- including the winner,

> Brian Mulroney -- are in the shadow cabinet. It's not unreasonable to expect these four, plus perhaps Joe Clark, to become ministers in any new Conservative administration.
>
> The result: Canadians would have a cabinet that has received more than $3 million from a clutch of donors still rigorously shielded from public view.

In summary, as Canadian leadership campaigns increase in importance and evolve towards the U.S. model, legislators may recognize what the Americans have practised for a long time -- that such candidate selection is a matter in the public domain, not a narrow issue of private party politics. Perhaps then Canada and, of course, Ontario should follow the example of the U.S. where public regulation of the leadership selection process is viewed as an essential component of overall election finance regulation.

D. Public Money in Leadership Campaigns

While some justify the need for disclosure and other public regulation on the basis of the growing importance of leadership conventions, others argue simply that because public money goes to leadership campaigns, the public has a right to regulate campaign financing. There are two ways in which public money is used in leadership campaigns -- (1) when candidates make use of publicly-supported resources such as their paid political staff, their travel and telephone

allowances, and (2) when money raised with the political tax credit is used to fund particular leadership candidates.

Leadership candidates, especially when they are cabinet ministers, are supposed to pay for their own travel when they are campaigning and are supposed to finance paid campaign workers out of leadership campaign funds. But, as Professor Joseph Wearing, who has written recently on this subject, explains, the separation of government business and campaign activity is, in practice, quite arbitrary:

> If a minister flies to Vancouver, conducts departmental business in the morning, addresses the Canadian Club with a speech prepared by an executive assistant and meets with Vancouver delegates in the evening, what proportion of the cost should be charged to the public purse and what proportion is campaign expense?[27]

This issue arose several times during the federal Liberal campaign, until Pierre Trudeau ordered the ministerial contenders not to abuse the use of their government jets.[28] The problem also arose more recently in the Parti Quebecois leadership campaign, when there were complaints that ministers were using limousines, free telephone lines, political aides and other perquisites to further their leadership campaigns. In dealing with this matter, P.Q. election campaign president Francine Jutney admitted there was not much she could do "It's not my prerogative to control ministerial expenses."[29]

Candidates who are not ministers may also be able

to take advantage of such public resources. Mr. Turner, for example, had the support of several ministers, particularly Lloyd Axworthy, who had a large ministerial staff in Ottawa. As the veteran political analyst Anthony Westell points out, "there can be important savings if a candidate has the support of M.P.'s and, even better, cabinet ministers, because these professional politicians have access to government phone lines and mailing privileges".[30]

While the concern about the use of public resources in leadership campaigns is important, the use of tax-deductible contributions to fund leadership candidates is even more urgent. Under federal and provincial income tax legislation, a percentage of a contribution to political parties or candidates, up to a maximum of $500 for a $1,150 contribution, is deductible from taxable income. Parties are authorized to issue receipts to donors for tax purposes year-round, and generally this money is used for elections and other general party expenses. However, there is little control on what the parties can do with the money once they have received it, and this has led to abuses.

In 1983, for example, the federal Progressive Conservative Party seems to have devised a "pass-through" formula for its leadership candidates, whereby the party issued receipts for tax purposes for donations intended for a specific leadership candidate. In essence, taxpayers of every political leaning helped to subsidize

the Conservative's leadership campaign. It is clear from returns filed that money collected under Ontario's political tax credit system has been used by constituency associations of all parties represented in the Legislature to assist the leadership campaigns of their members. The Progressive Conservatives are rumoured to have made wide use of this system during its two leadership conventions in 1985. Estimates of constituency assistance up to $125,000 have been made. This money was provided by individuals or corporations which were given a tax receipt for their donation.

In summary, there is evidence that public money is being used in party leadership campaigns. Unless measures can be devised to prevent this from occurring, this reliance of candidates on public funds presents a strong justification for the public regulation of leadership campaigns.

E. Self-Regulation by Political Parties

Self-regulation of leadership campaign financing by political parties has had a short and uncertain history in Canada. Only the New Democratic Party, at both federal and provincial levels, has adopted a broad regime of regulations, such as disclosure of contributions, contribution limits and spending limits.

The other two major parties, though quick to announce the implementation of finance regulation at the beginning of the campaigns, have declined to enforce it.

The problem of leadership campaign financing first came to public attention during the federal Conservative (1967) and Liberal (1968) leadership races. It was estimated that some leadership candidates may have spent at least $300,000, and even the more modest campaigns were reported to have cost about $100,000 per candidate.[31] Professor D.V. Siniley, writing in 1968, noted the emerging problem:

> The tradition in Canadian politics has been to divorce the "bagman" function from those running for elective office. It may be supposed that fund-raising for a leadership candidacy is a more personalized matter, perhaps involving the candidate himself more directly and at least raising for him the temptations of incurring explicit or implicit obligations to his benefactors. At any rate, it may be guessed that in financing their 1967 and 1968 leadership campaigns cabinet members and private M.P.'s have accepted moneys and services which under prevailing political ethics they would not have done in their purely parliamentary rolls.

> It is possible that, when we are on the verge of mitigating some of the abuses in party finance along the lines proposed by the 1966 Report of the Committee on Election Expenses, a new set of difficulties is arising with respect to party conventions.[32]

The Conservative's 1976 leadership campaign marked the first attempt by either of the two older parties to place controls on spending. At the beginning of the campaign, the party executive announced that all candidates would be required to submit accounts of their expenditures and to disclose donations of more than $1,000. When the party found out it had made a surplus on the convention, it added a sweetener -- $30,000 for each candidate who submitted a full report. Brian Mulroney was the only one who did not comply. As Professor Wearing states: "He was alarmed about the party's plan to make public the list of donors. Many of his donors were from Quebec and he claimed that, with the sort of 'hard-ball politics' being played by the Liberals in Quebec, his donors feared reprisals -- particularly those companies that held federal contracts".[33]

The Conservatives did not feel any necessity to set limits on expenditures. While spending by the major contenders had edged up since the last convention, the amounts were reasonable compared with today. It was estimated that Mr. Mulroney was the biggest spender at about $343,000 followed by Sinclair Stevens at $294,106, Paul Hellyer at $287,788, Jack Horner at $278,383, Claude Wagner at $266,538, and the winner, Joe Clark, at $168,353.

For the first time, the huge debts so common in today's campaigns appeared. Those candidates left with large deficits included Mr. Horner ($216,708), Mr. Hellyer ($205,829), Mr. Stevens ($180,041) and Mr. Wagner ($102,678).

In 1983, the federal Conservatives abandoned any self-policing. Because there was no requirement for disclosure, expense estimates vary widely, but there is no doubt that the costs of the campaigns made those of the 1960's and 1970's look ridiculously low. John Crosbie's expenses, originally estimated at about $1 million, were in fact "around $1.5 million," according to his campaign manager John Laschinger.[34] Joe Clark's campaign manager, Bill McAleer, says his campaign spent $800,000 to $850,000, including $200,000 in Quebec. However, in Mr. Laschinger's view, Mr. Crosbie (who spent only $100,000 in Quebec) spent the same amount as Mr. Clark and Mr. Mulroney outside Quebec.[35] Mr. Mulroney refuses, as in 1976, to divulge any information on costs, and estimates of his spending have varied from $750,000 to $2 million.[36]

The federal Liberals, in opening their 1984 leadership race, were determined to be more democratic. The Liberal national executive decided to impose a spending limit of $1.65 million on each candidate and ask them to submit statements of expenses and contributions after the convention.

There was much discussion during the campaign about the high spending ceiling, which some commentators felt would allow only wealthy individuals or those with wealthy friends to run. It is clear that Mr. Turner, who did not have the same access to political staffs and government jets as his opponents, was most insistent on the high limit. Both Mark MacGuigan and John Roberts publicly called for limits of about $500,000.[37] But others viewed the high limit as essential. As Senator Lorna Marsden stated, "you've got to spend enough so the country knows what's going on -- it's a very expensive process".[38] Mr. Turner's campaign manager, Bill Lee, contended that he had to run a "frugal" campaign to stay under the ceiling.[39] Others have noted that the amount of money a candidate can raise reflects not his personal wealth, but his ability to attract support from the Canadian people.

While the total expenditures of each candidate were not made public, each candidate claims he did not go over the spending ceiling. Totals for the principal candidates were estimated at "almost" 1.6 million for Mr. Turner, $1.5 million for Mr. Chretien and $875,000 for Mr. Johnston.[40] It is uncertain what the party could have done if a candidate had admitted that he exceeded the limit. As Robert Richardson, who wrote his thesis on the Liberal leadership selection process, points out:

> .... the rules that enforce the limit can be described as weak at best. Discipline for breaking the rule could include disclosing 'the entire budget and list of donors to the delegates'. Furthermore 'an overspending candidate also forfeits a $20,000 bond'. Neither of these rules, would prevent a candidate who wanted to overspend from doing so. They are at best weak and do not serve to protect other candidates from a single individual who could spend millions if he so desired.[41]

The Liberals' promises of public disclosure were also a disappointment. The party issued a statement nine months after the convention which aggregated all the candidates' statements of expenditures and provided some breakdown by category but not by candidate.[42] The party also published a list of donors who had contributed more than $500 without, again, indicating which candidate or candidates had received those contributions. Thus, the Liberals had disclosed even less information about funding than the Conservatives had back in 1976. Only the candidates' agents knew exactly how much and to whom each funder had contributed.

At the provincial level, the Progressive Conservatives have held two leadership conventions in 1985. But despite calls for spending limits and disclosure from the press, opposition politicians and one of the candidates, the party has not regulated its own leadership campaign financing.

In the fall of 1984, the party executive urged candidates to stay under $750,000, ordered the campaign

managers to report total contributions, names of contributors but not the amount contributed by each, and total amount spent within 60 days of the convention and promised to make the reports public.[43] The effort failed completely. The 60-day deadline passed without compliance by the Grossman, Timbrell and McMurtry campaigns. In September, 1985, the party executive decided not to press Mr. Grossman and Mr. Timbrell for their reports of the January convention, because of the impending November campaign. In addition, the executive decided not to make any of the reports public until January, 1986. Despite the suggested $750,000 limit, estimates of candidate expenditures matched those of their federal counterparts.

Disclosure became a big issue during the January campaign. A number of newspapers, including the Toronto Star,[44] the Globe and Mail,[45] and the Hamilton Spectator,[46] ran editorials calling for spending limits and the disclosure not just of the names of donors and the total amount contributed, but of the amount each donor gave to each candidate. In addition, N.D.P. Leader, Bob Rae introduced a Private Member's Resolution calling for the disclosure of this information.[47]

For the most recent convention, the P.C. party executive set a spending limit of $500,000, but provided no penalties for non-compliance. There is currently no information available about candidate spending for the November campaign, but a remark of one of the managers in a September 14, 1985 Globe and Mail article is revealing:

> On the record? It will be tough but you can run a campaign for $500,000, one of the four managers from January said, Off the record? Of course you can't, and won't if you want to win.[48]

The Ontario Liberal Party, recently reborn after years in opposition, has not yet experienced the problem of large expenditures during leadership campaigns. While the February, 1982 leadership campaign left some contenders in debt (Jim Breithaupt was saddled with a debt of $46,000),[49] observers estimate that David Peterson's leadership expenditures were only about one-tenth of those of the Tory candidates.[50]

In the 1982 N.D.P leadership campaign, candidates were restricted to total spending of $30,000, and none of the candidates went over $20,000. The maximum allowable for contributions was $1,000 in money or goods and services, and all contributions were disclosed. In addition, candidates were required to refrain from soliciting or accepting corporate contributions, in accordance with party policy.[51]

To sum up, recent experience suggests that self-regulation of leadership campaign financing by political parties has not been very successful. With the exception of the New Democratic Party, where the money spent during leadership campaigns is not substantial, no other party has demonstrated a serious commitment to enforce spending limits and disclose the identity of contributors, the amount they contributed and the candidate to whom they contributed. Part of the problem is a lack of will, but additionally there is the problem of enforcement. Even with their $30,000 carrot, there was nothing that the 1976 Conservatives could do to get their biggest spender, Brian Mulroney, to disclose the names of his donors. And this certainly has not hindered his political career. Perhaps, as Mr. Lee comments, political parties are not equipped for such self regulation:

> Parties can't properly police themselves. There are too few officials to check into how much money was collected and whether it was legitimately collected.[52]

Even if parties did have these resources, would they be willing to play the tough enforcer -- to disqualify a candidate for a serious breach of the financing rules? Probably not. Furthermore this reluctance will likely remain unless the parties are convinced by public opinion that a lack of regulation of their leadership races will hurt their party at the polls.

F. External Regulation of Leadership Campaigns

Existing Legislation

In 1975, Ontario's Election Finances Reform Act[53] was implemented, setting up a comprehensive scheme for the regulation of election financing. The Act went a great distance in limiting contributions, ensuring disclosure of funding sources and demanding audited statements from the parties, but it did not extend to internal party affairs, such as leadership campaigns and constituency nominations. In fact, subsection 1(3) of the Act specifically exempted such areas:

> 1(3) This Act does not apply to campaigns and conventions carried on or held in relation to the leadership of any registered party or in relation to contested constituency nominations for endorsation of official party candidates.[54]

Comments of Members of the Camp Commission

The Ontario Act grew out of the third report of the Ontario Commission on the Legislature[55] (the Camp Commission), which was issued in September of 1974. The Commission gave some consideration to leadership campaigns, but discarded the option of regulating them. Ten years later, two members of the Commission - Dalton Camp and Douglas Fisher - have contrasting views on what should be done about the growing problem of leadership campaign financing.

Mr. Camp says there were two reasons why the Commission decided not to deal with the leadership campaign

issue.[56] Firstly, "we had no real evidence that money materially influenced the result of a leadership campaign". More importantly, the Commission decided it would be an almost impossible task to regulate the financing of leadership campaigns. According to Mr. Camp, "Because political parties are such amorphous entities, regulation is very difficult. The worst thing you can have are laws that aren't enforceable". Mr. Camp, who has addressed the issue in several of his newspaper columns, concedes that leadership campaign financing is becoming a larger problem, as the amount of money spent during the campaigns increases. However, he maintains that "while the chances of self-regulation are not great, that is the best approach". To minimize the chances of undue influence, Mr. Camp suggests that all candidates have their donations funnelled into a blind trust, so that a candidate will have no knowledge of the identity of his contributors.[57]

Douglas Fisher, on the other hand, believes that comprehensive regulation of leadership campaign financing is needed, both because of the public money involved and because of the importance of today's leadership races. As Mr. Fisher states:

> Parties should have to live with regulation because they are into the public trough so deeply and thoroughly. For example, just look at M.P.P.'s telephone bills. You know what that's used for -- it's the Queen's Park network...

> If you were at that Tory convention in Toronto, you know that an awful lot of the money came through this system which we created. The system is being prostituted to support something that falls outside the scrutiny of the Commission.[58]

Nevertheless, says Mr. Fisher, even if no public funds were involved, the significance of leadership campaigns would justify regulation: "The real argument in principle is simply that the choice of leaders is so vital that the process needs to be part of the public domain of politics. It simply is not just the business of a private party".

G. The Dangers Inherent in Non-Regulation

The dangers that may result from the absence of any regulation of leadership campaigns are the same as those which have motivated election finance reform at both the federal and provincial levels in Canada -- 1) undue influence and 2) excessive spending.

The undue influence concern arises from the suspicion that a candidate may incur debts from anonymous backers which may create conflicts of interest for him if he ever attains higher office. There is no concrete evidence that this problem arises in Canadian leadership campaigns. In fact, most campaigns have fundraising committees that isolate candidates from direct contact with contributors. However, there have been rumours and hints of potential conflict of interest problems.

It is these suspicions and doubts that hurt the system and the candidate's credibility more than the reality. As the Toronto Star points out:

> This law protects both the public and the politicians. With public disclosure, we know who's funding a politician, and we can judge that politician's conduct accordingly. And the politician is conversely protected; by fully disclosing all donors, he prevents anyone from claiming he's the secret messenger for some wealthy interest.[59]

The second problem is the one that occurs when candidates can spend unlimited amounts of money for their leadership campaigns. There is an understandable concern that candidates may be elected not on the basis of their talents or ideas, but according to how much money they spend during the campaign. Recent leadership campaigns indicate that high expenditures by candidates (such as Peter Pocklington's $1 million bid for the federal Conservative's crown) do not necessarily translate into delegate support. But the high cost of campaigns does prevent some candidates from effectively conveying their message to the delegates. As Professor Courtney notes, referring to the 1967 Conservative campaign:

> Those candidates who were apparently seriously intent on winning the leadership but who were, at the same time, unable to raise substantial funds in their own support, suffered unnecessarily. Such, for example, was likely the problem with Michael Starr's campaign in 1967.[60]

There is increasing concern that leadership costs have risen to such an extent that serious candidates of modest means and connections must go deeply into debt in order to run for the leadership of a political party. A good example of this is John Roberts, who spent about half as much as John Turner and Jean Chretien in his 1984 Liberal leadership campaign, but remained a year-and-a-half later still $100,000 in debt.[61]

H. Conclusions

This part of the report has examined whether there is a need for public regulation of party leadership campaigns. Four points have been considered. Firstly, leadership campaigns perform a crucial function in the democratic process, one which, because of its importance, suggests public input and regulation. Secondly, public money is being used to fund leadership races and thus political parties cannot argue that the selection of their leader is a purely private matter. Thirdly, parties have shown themselves unwilling or unable to regulate their own leadership campaigns. And finally, because of the current lack of regulation, there are dangers that undue influence and excessive spending play a role in the selection of the leaders of our major parties.

These assertions suggest that there is justification for some public regulation of party leadership

campaigns, to ensure that they are conducted in as fair and democratic a manner as possible. But whether they over-ride the right of political parties and individuals to conduct their own affairs in their own way is a matter for decision by the Legislature itself. And even if the government has a right to regulate, is there a workable way to accomplish this? That question will be discussed in the next chapter.

## II Mechanisms of Leadership Campaign Regulation

### A. Introduction

The previous chapter suggested some reasons why party leadership campaigns should be controlled. This chapter discusses the next step -- how these campaigns can be regulated. A decade of experience with election finance reform has provided Ontario's legislators with a knowledge of the basic tools necessary for this purpose. Undue influence can be curbed by instituting disclosure provisions and contribution limits. (Equality may be enhanced by implementing spending limits, subsidies and, to a lesser extent, contribution limits.) This chapter will explore each of these measures in turn, as well as Dalton Camp's blind trust proposal to determine whether they can be used to regulate leadership campaigns. Problems specific to each mechanism will first be discussed, and in the last part of the chapter general issues which affect all of these provisions will be analyzed. This chapter makes generous use of opinions from politicians, party activists and others experienced in this area who were interviewed for that purpose.

### B. A Specific Analysis of Each Measure

#### Mandatory Disclosure of Contributions

Disclosure is the most basic, essential first step in any electoral finance reform. It is the simplest way to discourage attempts at undue influence and, perhaps

more importantly, to eliminate public suspicions of undue influence. But to be effective, disclosure provisions, unlike those of the recent federal Liberal convention, must be comprehensive. They must ensure that the identity of the contributor, the amount of his contribution and the identity of the candidate to whom he contributed are made public.

Critics of mandatory disclosure in leadership campaigns claim that it would wreak havoc on the fund-raising process. David Pretty, Chief Financial Officer for the Ontario Liberal Party, states that "Disclosure would create a lot of difficulties. If there are six candidates running, a corporation would have to give an equal amount to all candidates. It would likely have a negative impact on fundraising."[62] Dalton Camp agrees:

> (There are) natural, human reasons why public disclosure of contributions for leadership campaigns will not likely work. Any donor, for example, prepared to make a healthy contribution to Jean Chretien's leadership campaign might have been reluctant to do so if he knew John Turner would learn of it.
>
> Disclosure, in leadership campaigns, would make front-runners lavishly rich and impoverish the rest of the field. Given disclosure, donors would either bet the field -- a little to each and not enough to any -- or they would only back a sure thing. Or back no one.[63]

These criticisms echo the same arguments raised by critics when the Camp Commission first proposed instituting mandatory disclosure of contributions for Ontario elections. Not only was it feared that publications of the donor's identities would reduce the amounts given, but also that disclosure would tend to artifically equalize these amounts among parties, as donors would fear giving a preponderant amount to one party. This fear, expressed in many jurisdictions, has certainly not prevented parties and candidates at the federal level, in many of the provinces, and in the United States, from raising record amounts of money despite disclosure provisions. David McFadden, M.P.P. and president of Ontario's Progressive Conservative Party, would like to see parties ensure disclosure during their leadership campaigns. As he states, "Disclosure doesn't seem to have stopped people from donating money to parties. Disclosure of leadership funding might tend to spread contributions around. It would be positive. Disclosure is always positive."[64]

Interestingly, of those canvassed, Bill Lee, the leadership campaign manager for John Turner, was one of the most insistent on the need for disclosure:

> There should be public disclosure of those who fund leadership campaigns, keeping in mind the enormous power wielded by that person once he becomes either the Prime

> Minister or the leader of the opposition. It would probably decrease or inhibit donations to a degree, but at the same time for fairness reasons or because of what can happen afterwards, I think it would be in the public interest.[65]

Of course, it is difficult to predict exactly what effect disclosure would have on leadership campaign financing, although we can draw some conclusions from experience with election campaign regulation. Any tendency for disclosure to decrease donations might be mitigated by extending the political tax credit for donations to leadership candidates (this will be more fully discussed below). As Mr. Camp, in another comment, has stated:

> You couldn't make any fundamental changes in a system that needed change unless you had disclosure. The public interest is best protected by disclosure. Once you have this, however, it's going to be more difficult for the parties to finance themselves. Against this hazard you introduce some form of incentive to contribute and a subsidy. Once you do that, you're into public accountability.[66]

Contribution Limits

Contribution limits are intended to reduce the risk of undue influence by large donors, though they may have a subsidiary effect in reducing overall campaign expenditures. Such limitations must not be vague, as they can be circumvented in a number of ways.[67] Contribution

limits for party leadership campaigns might usefully be modelled upon Ontario's Election Finances Reform Act, which in sections 17 through 35 provides an effective legislative framework for implementing such limits.[68] These provisions prevent large donations, without stopping people from contributing as much voluntary labour as they wish to a particular candidate.

However, legislators should study the issue carefully before applying s. 19(3) of the Act, which states that any personal funds used by a candidate will be deemed to be a contribution. If this provision were used for leadership campaigns, it would have drastic effects on some candidates, who until now could rely on their own funds for a large part of their financing. In principle, however, such a measure would be positive, as it would prevent a rich candidate with no support from outspending candidates with more credibility, but less money.

Contribution limits have traditionally been used only in conjunction with disclosure provisions. However, Mr. Pretty has suggested that for leadership campaigns, because disclosure may be damaging, contribution limits could be imposed by themselves. This is an interesting idea, but the necessary measures for secrecy would be cumbersome for a proposal designed to open up the leadership selection process. In addition, the public agency which audited the party accounts but kept the information secret would have to gain an unusually high degree of trust from both the parties and

the public.

The chief problem in setting contribution limits would be determining the appropriate ceiling. From the scanty financial information available, it appears that large donors are important in leadership campaign financing. The Liberal Party of Canada's leadership campaign financial statements list the names of 1,108 individuals and corporations that gave more than $500. Their $4.1 million was 77 per cent of the total contributions of $5.2 million. The average contribution from this group was $3,654. Does this mean that $4,000 is a good place to draw the line?

According to Professor Wearing, most campaign managers for both Liberal and Conservative leadership campaigns claimed that they did not accept donations of more than $10,000.[69] Is $10,000 a better limit? Should it be less in Ontario? Should it apply to all parties, including fringe parties, and if it does, should the limit vary from party to party, according to how much is usually spent by a candidate? These are only a few of the questions that arise. Obviously, if the government decided contribution limits were necessary, it would help to meet with representatives of all parties and design a suitable mechanism to determine the appropriate amounts and other guidelines.

A Blind Trust

Dalton Camp, the man who is perhaps Canada's foremost expert on election finance reform, has recently proposed a measure which he says will prevent undue influence, with a minimum of public regulation. In considering the issue of leadership donor anonymity in Ontario's P.C. race, he has explained:

> Perhaps the public ought to know. Then again, why should it. What the public interest requires is not necessarily satisfied by disclosure insofar as leadership campaigns are concerned. It seems to me all the public interest requires is that the contributors do not, by the amount of their contributions, purchase any unique or special advantage ...
>
> Most leadership candidates, if they are wise, make it a point not to know -- or say they don't -- where their campaign contributions come from. No names, no problem. But in fact they can find out if they want, or be told even if they don't.
>
> To be protected against doubt and suspicion, the candidate could direct all his contributions to his cause to a truly blind trust -- to an audit firm, for example, or to any third party once removed from the political environment. As a result, all he would ever know is how much was raised and he could never find out who gave and how much.[70]

Although Mr. Camp's idea does not prevent a large donor from telling the candidate exactly how much he's contributed and asking for a favour, it is an improvement

on the current system. It could be applied in Ontario if the government decides that a limited, 'hands off' approach is better than thoroughgoing regulation of leadership campaigns.

Spending Limits

Most commentators agree that leadership spending is ridiculously high. Certainly there are essentials, such as travel, telephone, printing and postage, office supplies and staff, which can be expensive. Much of the spending is often in needless areas, however as Professor Wearing explains, "everyone is affected by the tense competitive atmosphere. So-and-so is rumored to be spending $100,000 on a barbecue, so the other camps are under pressure to keep up with candidate Jones."[71] The need to abide by spending limits may thus be in the candidate's best interests, but there are serious problems as to how such limits can be implemented.

First, there is the question of whether candidates can realistically be expected to keep track of all their spending. John Reid, a former M.P. and one of the architects of the federal legislation, notes that:

> In a leadership campaign there is even less spending control than there is over a constituency. In the constituency, the party is an ongoing organization. But with a leadership campaign, put together on the spur of the moment, you're dealing with a limited, flexible organization. It's harder to figure out how much it all costs.[72]

Others, such as Bill Lee and Don Smith, president of the Ontario Liberals and Mr. Peterson's fundraiser during his leadership campaign, disagree. "It wouldn't be difficult to audit and record leadership expenses. By-elections and elections also come up irregularly and require campaigns to be put together on the spur of the moment." In fact, any efficient leadership campaign must have the ability to set a budget and record expenses, and it is likely that the candidates would have few problems with recordkeeping if they were required to maintain a list of expenses.

A second problem is defining what a campaign expense is, for the purpose of the limits. Officials at the federal level have grappled with this problem for years. Any definition must necessarily be flexible, to allow for the constantly changing nature of political campaigns. This flexibility does allow candidates who want to go beyond the limit to circumvent the provisions by "creative interpretation" of the definitions, however at the federal level, for example, those expenses which fall on the borderline -- national office expenses, money spent on polls, or fundraising by mail -- are interpreted by the parties in the way that best suits their own interests. It would therefore appear to be necessary not only to have leadership campaign expenses clearly defined, but to have a body representative of the parties and non-partisan officials (such as the Ontario Commission on Election Contributions and Expenses) meet periodically to review and adjust the definition.

A third problem involves the inevitable mix of public and private resources in leadership campaigns. As mentioned above, leadership candidates are often able to use the services of ministerial assistants, secretaries, researchers and other public employees, to say nothing of the transportation and communications systems at their disposal. In an election campaign, such services are commonly regarded as one of the natural advantages of incumbency. In a leadership campaign, however, the determination of whether a flight to Thunder Bay on "government business" should be considered a leadership campaign expense could cause tremendous problems.

The final problem is similar to that which arose with regard to contribution limits. How much should the limit be and who should decide what it could be? The federal Liberals placed a $1.65 million limit on leadership campaign expenditures, but several of the candidates stated they felt a $500,000 limit was more reasonable. In Ontario's recent P.C. conventions, limits of $500,000 or $750,000 were suggested, but most candidates spent much more than that. Clearly, the limit must be high enough to allow each candidate to travel through the constituencies, to effectively present his ideas to delegates and to organize a strong showing at the convention. Should this amount

vary from party to party? The Ontario N.D.P. found that a $30,000 limit was more than reasonable at their 1982 convention, but a Tory candidate would argue that such a limit was ludicrously low. Again, the only way to impose spending limits would be to design a suitable mechanism to determine the appropriate amounts and other guidelines. As with contribution limits, it is the parties themselves which could best decide the appropriate spending limit for leadership candidates of their particular party.

Subsidies

Tax-deductible Donations

As discussed above, there is ample evidence that tax-deductible contributions to political parties have been used to fund leadership candidates. However, a tax-credit system for leadership campaigns would go further, allowing contributors to get a tax credit for money paid directly to the leadership candidate's campaign, without it having to go to the party first.

Such a provision would be a boon to candidate fundraisers, who sometimes find it difficult to raise money without a tax rebate. Corporations, in particular, are much more hesitant to give money to leadership candidates than they are to donate to the party itself,[73] and the tax credit might persuade them to give more generously. But if federal and provincial experience with political tax credits is any indication, they would

most encourage smaller donations. According to Roger Dubé, former director of election financing with the Office of the Chief Electoral Officer of Canada, "the tax credit had the effect of involving thousands of people who never before gave much to political parties... people also became more politically aware in those elections where they made contributions than they had previously."[74] Thus tax credits might encourage more public participation in leadership campaigns, complementing the trend toward a more open and participatory process that has been observed earlier in this report. And they would likely help candidates with "grass roots" support, but few large contributors, get their campaigns off the ground.

There do not appear to be any major practical problems with extending the tax credit to leadership campaigns. An effective criticism can be mounted on grounds of policy, however Canadian taxpayers already spend millions of dollars paying for elections and for the ongoing expenses of political parties. Should they have to dig deeper into their pockets to subsidize the leadership selection process of a political party, or should there be an overall limit for political tax credits? Perhaps it would be better to concentrate on ways to end the current flow of public money to leadership campaigns, rather than trying to increase this flow. Against this criticism, one can mount the argument that because of their crucial importance in the political process, leadership campaigns have become public events, and it is in the

public interest to ensure that they are conducted fairly and openly. If taxpayers are willing to subsidize the electoral system, they should be willing to subsidize this second integral part -- the party leadership campaigns -- of the system. Ontario's legislators must make a fundamental policy choice between these two options.

Direct Subsidies

The federal government and a number of provinces provide direct public subsidies to parties and candidates who garner a certain percentage of the popular vote (usually 15 per cent). This measure could be used in leadership campaigns to help small campaigns get off the ground and to alleviate the problems of massive campaign debt. A threshold test would have to be used, to prevent the funding of fringe candidates with no support. The idea has some support, but there are problems.

Firstly, there is some danger that subsidy provisions that use a threshold test may soon be challenged in the courts as unconstitutional under the section 15 equality provisions of the Canadian Charter of Rights and Freedoms.[75] Secondly, if a threshold test were used, it is uncertain what an appropriate percentage should be. Should the amounts in effect in Canadian elections (15 percent in most jurisdictions, 20 percent in Quebec and New Brunswick, and 10 percent in Manitoba) be applied to leadership campaigns, or should the threshold be lower for elections because there are more candidates involved.

Thirdly, there are problems of deciding how much the subsidy should be and whether it should vary from party to party. Should leadership candidates in all parties, including fringe parties, receive the subsidies, or should there be a double threshold test, providing subsidies only to qualifying candidates in those parties which received 15 percent of the vote of the last election. Finally, there is the inevitable issue of providing public money for a private party affair -- an issue which becomes even more acute when the subsidy is direct, rather than an indirect subsidy through the tax system.

C. General Problems Pertaining to All These Measures

Enforcement

It is easy for the state to enforce general election finance regulations, because it has the power to disqualify candidates and impose fines on those who breach the rules. These powers are given to the state because they are viewed as necessary to ensure that public elections are conducted in as fair and democratic a manner as possible. But it is questionable whether the state should be given this authority to regulate what have always been private party matters. As Mr. McFadden states:

> It's a dangerous precedent if the government were to step in and regulate internal matters within parties, because after all, the watchdog agency will either represent the interests of the major parties, or the government of the day. It's never totally independent.[76]

If a party refuses to apply the rules (for example, mandatory disclosure), the government agency might be justified in penalizing the party. But what would happen if a leader refused to disclose his contributors. Could the state disqualify a leadership candidate? Or suppose the winner of a leadership campaign later revealed that he had gone over his expense limit. Could he be disqualified or fined? Perhaps the only way the state could try to enforce these regulations would be to use incentives, such as in the United States, where a candidate in a presidential primary can only receive federal matching funds if he agrees to abide by certain record keeping and auditing requirements, as well as expenditure and contribution limitations.[77] Financial incentives may not work, however, as the example of Mr. Mulroney in 1976 demonstrated. These enforcement problems are crucial, and no steps to implement public regulation of leadership campaigns can realistically be taken before they are resolved. As Mr. Camp has pointed out:

> ...I have not met anyone who knew anything about the internal realities of leadership races who believed that full disclosure would be enforceable or, even if it were, that it would work. After all, the reason nothing has been done yet to reform this aspect of politics could only be that no one has found a practical, sensible way to do it.[78]

The Legality of These Measures Under the Charter

If an effort were made to regulate party leadership campaigns, these regulations could be challenged under the Charter. The subsidy provisions might be challenged under section 15, as mentioned above. But the most likely challenges would flow from section 2, which reads:

> 2. Everyone has the following fundamental freedoms:
> (a) freedom of conscience and religion;
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
> (c) freedom of peaceful assembly; and
> (d) freedom of association.

Subsection 2(b) could be used to challenge spending limits if they were applied to leadership campaigns, on the grounds that such limits infringed a candidate's freedom of expression. Buckley v. Valeo,[79] the American case which is the leading one in this area, has declared that restrictions on a candidate's use of his own funds and general spending limits on candidates violate the First Amendment guarantee of free speech. However, the court did authorize the use of spending ceilings for candidates who chose to accept public subsidies. One could argue that spending limits on leadership campaigns would be valid because, as mentioned before, public money plays a role in funding some candidates. However, it is uncertain whether this would be sufficient to

satisfy the Buckley test. And besides, there will be some candidates who have not received that public money, who under the Buckley test would be exempted from the limits. If, however, Ontario's legislators decide to subsidize leadership campaigns, expense limits would be valid.

Of course, Buckley is an American precedent, so its influence in Canadian jurisprudence is mitigated by our own unique political and legal traditions. Our political traditions place even more emphasis than the Americans do on the separation between private intra-party matters and election matters of general public concern. Canadian courts will likely recognize the need to regulate political parties and candidates so far as their actions specifically relate to elections. But it is unlikely that they will have sympathy for an argument that excessive campaigning during a leadership campaign justifies a limitation of a person's ability to express himself during a private, intra-party election. The one Canadian case which has looked at the spending limit issue, National Citizens' Coalition Inc. et al v. Attorney General for Canada,[80] has shown that courts may not appreciate measures which place spending limits on persons who are not directly involved in an election campaign.[81]

Leadership campaign regulations might also be challenged under subsection 2(d) of the Charter, on the ground that they prevent political parties from

"associating" (holding meetings, electing leaders, etc.) without state interference. This is essentially an argument that the state has no right to meddle in private party matters. It could be validly applied if, for example, the government commission overseeing the regulations disqualified the popular, newly-elected leader of the opposition for a breach of the rules. Similarly, it could be argued that low spending limits would make it impossible for leadership candidates to properly communicate with their members, thus infringing their ability to associate.

In summary, Ontario's legislators should carefully examine the legal repercussions, particularly with regard to the Charter, before applying restrictions on the leadership campaigns of political parties.

## D. Conclusions

The first chapter of this part of the report indicated that leadership campaigns could be regulated and showed that, until now, the parties themselves have not effectively regulated their campaigns. This chapter has shown that there are various useful ways in which leadership campaigns could be regulated, but that there are significant legal, policy and practical problems which make regulation by the state difficult.

FOOTNOTES - PART II

1. Buckley v. Valeo (1976) 424 U.S. 1.

2. National Citizens' Coalition Inc. et al v. Attorney General for Canada (1984) 14 C.R.R. 61 (Alta. Q.B.)

3. S.C. 1973-74, C. 51, as amended.

4. Supra, note 1.

5. Supra, note 1 at p. 15.

6. Ibid. at p. 19.

7. J. Patrick Boyer, Political Rights: The Legal Framework of Elections in Canada (Toronto: Butterworths & Co., 1981), p. 165.

8. Supra, note 1 at p. 95.

9. Supra, note 2.

10. Ibid. at p. 76

11. Ibid. at p. 74.

12. Interview with Jean-Marc Hamel, Chief Electoral Officer of Canada, Ottawa, July 12, 1985.

13. Supra, note 2 at p. 71.

14. S.M. 1980, c. E-32

15. McKay et al v. The Government of Manitoba, an unreported decision of the Court of Appeal at Manitoba, November 14, 1985.

16. Ibid. at p. 7.

17. Supra, note 1, at p. 57.

18. R.S.O. 1980, c. 134.

19. Supra, note 1 at p. 74.

20. M. Bloom, Public Regulations and Presidential Campaigns (New York: Crowell & Co., 1973), p. 187.

21. This exception occurred in 1941 when Arthur Meighen was invited to resume the leadership of the Conservatives by a special conference of the Dominion Conservative Association. Meighen's defeat in a by-election, and subsequent resignation, led to the 1942 convention.

22. John R. MacNicol, National Liberal-Conservative Convention - held at Winnipeg, Manitoba, October 10 to 12, 1927 (Toronto: Southam Press, 1920), p. 11.

23. "Are leadership costs too high?" Toronto Star, March 28, 1984.

24. "Trying to be first chews up dollars." Toronto Star, October 20, 1984.

25. John Courtney, The Selection of National Party Leaders in Canada (Toronto: Macmillan, 1973), p. 141.

26. "Tories study U.S. primary system for use in electing party leaders." Ottawa Citizen, June 20, 1985.

27. Joseph Wearing, "A Note on Campaign Finances," (part of an as yet unpublished article, provided on November 25, 1985), p. 3.

28. "P.M. gets tough on contenders' jet use," Toronto Star, April 4, 1984, p. A8.

29. Globe and Mail, September, 1985

30. Anthony Westell, "Questions about the funding of party leadership candidates," Toronto Star, May 27, 1984.

31. Courtney, p. 91.

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54. s. 1(3), R.S.O. 1980, c. 134.

55. Ontario Commission of the Legislature, Third Report (September, 1974).

56. Dalton Camp, Interview, August 29, 1985

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58. Douglas Fisher, Interview, July 11, 1985.

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61. Globe and Mail, November 23, 1985.

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63. "Leadership funders should be anonymous," Montreal Gazette, November 20, 1984.

64. David McFadden, Interview, July 24, 1985.

65. Bill Lee, Interview, July 11, 1985.

66. Dalton Camp, quoted in Commission on Election Contributions and Expenses, Canadian Election Reform: Dialogue on Issues and Effects, December 1982 (Toronto: 1982), pp. 123-24.

67. See Patrick Boyer, Money and Message: The Law Governing Election Financing, Advertising, Broadcasting and Campaigning in Canada, (Toronto: Butterworths, 1983), p. 12.

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69. Joseph Wearing, A Note on Campaign Financing pp. 5-6.

70. Montreal Gazette, November 20, 1984.

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73. Wearing, in his study (p. 6) noted: "All the fundraisers claim to have had difficulty raising money from corporations. Only one-quarter of Mulroney's money apparently came from corporations, for example Johnston is said to have received almost no corporate donations. According to some fundraisers, it was the large corporations in particular that were reluctant to get involved with a particular candidate, even though many of them make a practice of contributing to both of the older parties. This is borne out by the Liberal list of contributors. Only 84 of the country's top 500 firms gave over $500, though others admittedly may have given $500 or less. Almost twice as many contributed over $500 to the Liberal party itself in 1984."

74. Roger Dube, quoted in Canadian Election Reform, supra note 5, p. 42.

75. See Chapter 4, supra.

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81. See Chapter 4, supra.

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